



## San Francisco Law Library

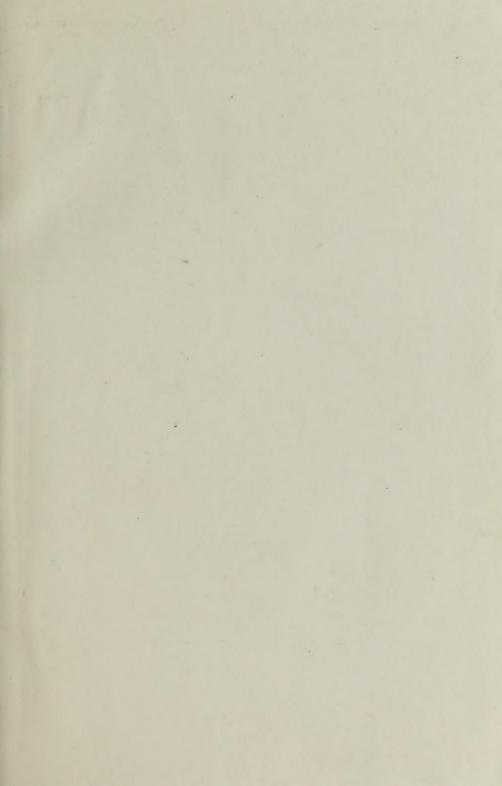
No.

Presented by

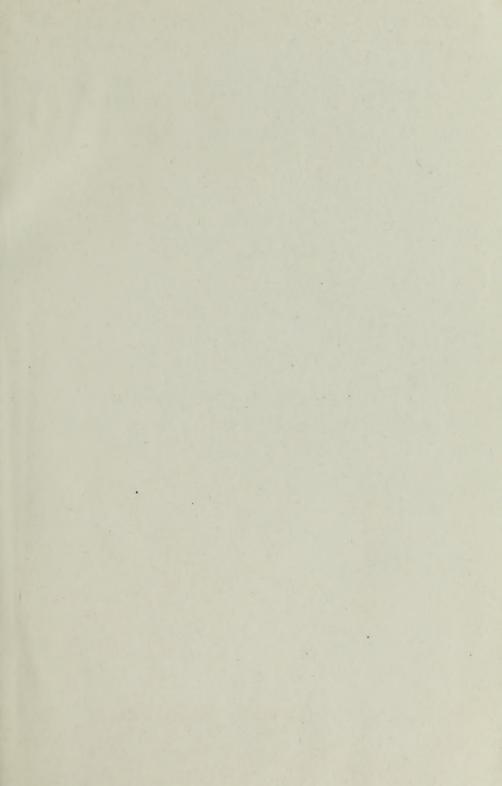
#### EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive in 2010 with funding from Public.Resource.Org and Law.Gov





# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

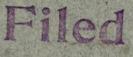
F. T. MEYER
PLAINTIFF IN ERROR

VS

PACIFIC MACHINERY COMPANY DEFENDANT IN ERROR

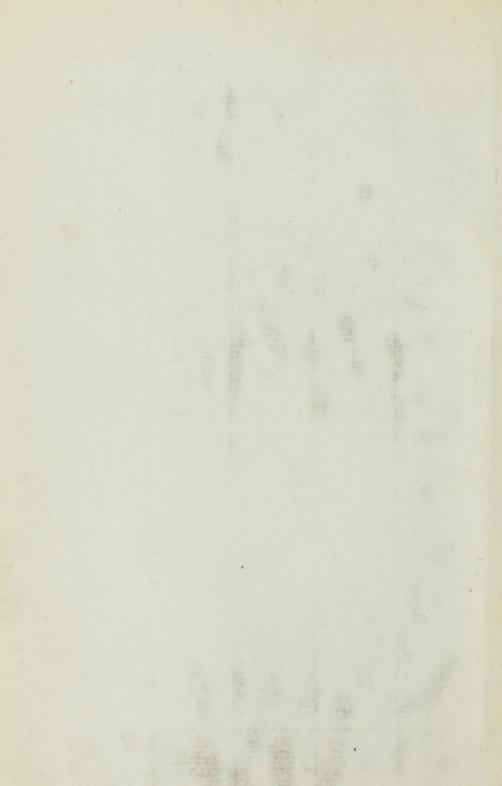
### TRANSCRIPT OF RECORD

Upon Writ of Error to the District Court of the United States for the District of Oregon



JAN 22 1917

F. D. Monckton,



## United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. T. MEYER
PLAINTIFF IN ERROR

VS.

PACIFIC MACHINERY COMPANY
DEFENDANT IN ERROR

## TRANSCRIPT OF RECORD

Upon Writ of Error to the District Court of the United States for the District of Oregon ARTER COMMENTS OF STREET

INDEX	Page
Amended Complaint	4
Amended Complaint, Exhibit A to	8
Answer	17
Assignment of Errors	201
Bill of Exceptions	33
Testimony for Plaintiff:	
Ira Bronson	55
Cross examination	58
Re-direct examination	66
Edward I. Garrett	35-96
Cross examination	102
Thomas S. Garrett	36
Cross examination	44
Re-direct examination	54
Re-cross examination	55
Testimony for Defendant:	
William G. Bohn	70
Cross examination	79
Re-direct examination	87
Re-cross examination	93
J. J. Cook	117 119
Re-direct examination	119 $120$
Re-cross examination	121
C. D. Latourette	121
Cross examination	126
D. C. Latourette	107
Cross examination	109

INDEX	Page
Re-direct examination	112
Re-cross examination	113
F. T. Meyer	114
Cross examination	115
Plaintiff's Exhibits:	
Δ	34-39
В	67
Defendant's Exhibits:	
2	62-137
3	75-142
4	84-142
5	84-155
6	89-167
7	90
8	95-176
Judgment Roll No. 5205	106-179
Findings of Fact and Conclusions of Law	
requested by defendant	131
Bond on Writ of Error	206
Citation	1
Clerk's Certificate to Transcript	210
Complaint, Amended	4
Conclusions of Law requested by defendant.	131
Exhibits (See Bill of Exceptions)	
Exhibit A to Amended Complaint	8
Findings of the Court	30
Findings of Fact requested by defendant	131
Judgment	31

INDEX	Page
Opinion	25
Order allowing Writ of Error	205
Petition for Writ of Error	200
Praecipe for Transcript	209
Reply	22
Stipulation waiving Jury	209
Testimony (See Bill of Exceptions)	
Transcript, Clerk's Certificate to	210
Transcript, Praecipe for	209
Writ of Error	2
Writ of Error, Bond on	206
Writ of Error, Order allowing	205
Writ of Error, Petition for	200

N.T.	
10	
4100	 

United States Circuit Court of Appeals for the Ninth Circuit.

F. T. MEYER,

Plaintiff in Error,

vs.

The Pacific Machinery Company, a corporation,

Defendant in Error.

Names and Addresses of Attorneys of Record:

Dolph, Mallory, Simon & Gearin and Hall S. Lusk, Mohawk Building, Portland, Oregon, for the Plaintiff in Error.

Ira Bronson,
Coleman Building, Seattle, Washington,
for the Defendant in Error.

In the District Court of the United States for the District of Oregon.

THE PACIFIC MACHINERY COMPANY, a corporation,

Plaintiff and Defendant in Error,

v.

F. T. MEYER,

Defendant and Plaintiff in Error.

#### CITATION ON WRIT OF ERROR.

United States of America, District of Oregon. } ss.

To the Pacific Machinery Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein F. T. Meyer is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment mentioned in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this 14th day of November, in the year of our Lord, one thousand nine hundred and sixteen.

CHAS. E. WOLVERTON, Judge.

Due service of the foregoing citation on writ of error admitted this 16th day of November, A. D. 1916.

BRONSON, ROBINSON & JONES, Attorneys for Defendant in Error.

Filed, November 17, 1916.

G. H. MARSH, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

F. T. MEYER,

Plaintiff in Error,

VS.

THE PACIFIC MACHINERY COMPANY, a corporation,

Defendant in Error.

#### WRIT OF ERROR.

The United States of America, ss.

## THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Judge of the District Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between The Pacific Machinery Company, a corporation, Plaintiff and Defendant in Error, and F. T. Meyer, Defendant and

Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error. as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 14th day of November, 1916.

(Seal) G. H. MARSH,

Clerk of the District Court of the United

States for the District of Oregon.

Service of the foregoing Writ of Error made this 14th day of November, 1916, upon the District Court of the United States for the District of Oregon, by filing with me as Clerk of said Court a duly certified copy of said Writ of Error.

G. H. MARSH,

Clerk, United States District Court,
District of Oregon.

Filed November 14, 1916.

G. H. MARSH,
Clerk, United States District Court,
District of Oregon.

In the District Court of the United States for the District of Oregon.

November Term, 1913.

Be it remembered, that on the 3rd day of November, 1913, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Complaint, in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon.

THE PACIFIC MACHINERY COMPANY, a corporation, Plaintiff,

VS.

F. T. MEYER, Defendant,

No. 5698. AMENDED COMPLAINT.

Comes now the plaintiff, and having obtained leave of Court therefor, files this its Amended Com-

plaint herein, and for cause of action against the defendant alleges as follows, to-wit:

#### I.

That the plaintiff now is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and a citizen and resident thereof, having its office and principal place of business at the City of Seattle, in said State of Washington.

#### II.

That the defendant, F. T. Meyer, now is, and at all times herein mentioned has been, a citizen and resident of Oregon, residing at Oregon City, Clackamas County, in said State of Oregon.

#### III.

That the plaintiff now is, and at all times herein mentioned has been, the owner of and lawfully entitled to the possession of all of that certain personal property situate, lying and being in the mill formerly occupied and operated by the Oregon City Lumber Company at Oregon City, in Clackamas County, State of Oregon; and which machinery is more particularly described and itemized in the schedule hereto annexed and marked Exhibit "A," and made a part of this complaint.

#### IV.

That on or about April 29th, 1909, plaintiff delivered said personal property to The Oregon City Lumber and Manufacturing Company, a corporation, under a certain contract or letter in writing, accepted by said The Oregon City Lumber and Manufacturing Company, by the terms of which contract the title to said personal property remained in the plaintiff until the full performance of the terms and conditions of said contract to be performed by The Oregon City Lumber and Manufacturing Company and the payment of the amount of the purchase price thereof, and that in case said The Oregon City Lumber and Manufacturing Company failed to perform the terms and conditions of said contract, or failed to make the payments provided to be made by said The Oregon City Lumber and Manufacturing Company, said contract should become void at the election of the plaintiff, and said property immediately returned to the plaintiff.

#### V.

That The Oregon City Lumber and Manufacturing Company failed to perform the terms and conditions of said contract, and failed to pay to the plaintiff the purchase price provided for therein, or any part thereof; that the plaintiff has elected to declare said contract void and has given notice thereof to The Oregon City Lumber and Manufacturing Company; that The Oregon City Lumber and Manufacturing Company on or about November 10th, 1909, made an assignment for the benefit of creditors to John J. Cooke and John W. Moffitt; that said John J. Cooke and John W. Moffitt, as

assignees of said company, on April 20, 1911, assumed to sell all of the property of said company, including the property above described, to the defendant, F. T. Meyer, and placed said defendant in possession thereof; that said defendant was informed, and had notice that said contract between the plaintiff and The Oregon City Lumber and Manufacturing Company had been declared void, and had notice and was informed that the plaintiff was the owner of said property.

#### VI.

That the value of said property is, and at all times herein mentioned was, the sum of Seventytwo Hundred Dollars.

#### VII.

That the plaintiff has demanded possession of said personal property from the defendant, but defendant unjustly detains the same to the damage of the plaintiff in the sum of Seventy-two Hundred Dollars.

Wherefore, the plaintiff demands judgment against the defendant for the recovery of the possession of said personal property, or for the sum of Seventy-two Hundred Dollars, the value thereof, in case delivery cannot be had, together with interest thereon from the date of the institution of this action.

IRA BRONSON, Attorney for Plaintiff. State of Washington, County of King. ss.

JOSEPH HEWITT, being first duly sworn, on oath deposes and says: That he is the assistant secretary of The Pacific Machinery Company, a corporation, plaintiff in the above entitled action; that he has read the foregoing amended complaint, knows the contents thereof and believes the same to be true.

### JOSEPH HEWITT,

Subscribed and sworn to before me this 31st day of October, 1913.

(Seal)

W. L. GRILL,

Notary Public in and for the State of Washington, residing at Seattle.

#### EXHIBIT "A."

- 1 11x14 Beck Type Engine Feed.
- 1 No. 4 A Mitts & Merrill Hog or Edging Grinder complete.
- 1 5 H. P. Sterling Vertical Engine complete with all regular trimmings.
- 1 Combination Lath Mill and Bolter with a capacity of 40 to 45 M. Bartlett & Company make. Including six saws.
- 1 Combination Lath Binder and Trimmer comcomplete except saws.
- 1 Prescott 14 Saw Under Cut Trimmer complete with all necessary iron work and all necessary wood work and 476' of table chains.

- 1 Heavy Pacific Coast Type Slab Slasher for 7 saws spaced 4' 1" centers. Including heavy drive rig.
- 1 5 Tooth Expansion Sprocket Wheel for  $\frac{7}{8}$ x6 Long Length Conveyor Chain fitted to above shaft.
- 1 Spur Gear 63 teeth,  $1\frac{1}{2}$ " pitch, 4" face, bore 2.15/16" key seated and fitted.
- 1 Shaft 2 7/16"x5' 3" key seated.
- 1 Spur Pinion 13 teeth, 1½" pitch, bore 2 7/16" key seated and fitted.
- 1 3x8x2 7/16" Bevel Iron Friction Wheel key seated and fitted.
- 1 Shaft 2 7/76"x11' 6" keyseated and fitted.
- 1 12x9x2 7/16" Bevel Paper Friction Wheel keyseated and fitted.
- 1 2 &016"x4".
- 2 20x20 double cut end conveyor drum keyseated and fitted.
  - 200' of  $\frac{7}{8}$  genuine eastern made hand, hand welded, tested and warranted, long length conveyor chain, made of double refined iron.
- 1 Shaft 1 15/16x4′ 6″ keyseated.
- 3 15 Tooth Sprocket Wheels for No. 78 Riveted Chain, keyseated and fitted.
  - 30' of  $\frac{1}{4}$ "x3 $\frac{1}{2}$ " Plat Iron with  $\frac{1}{4}$ " screw holes.
- 2 Sprockets 15 Tooth No. 78 Fitted—2 Shaft 17/16x12".
- 1 Shaft 1 15/16x7' keyseated and fitted.
- 1 Spur Paper Friction Wheel 6"x7x15/16" key-seated and fitted.

- 1 Shaft 2 7/16"x2' 6" keyseated.
- 3 15 Tooth No. 78 Chain Sprockets, bore 2 7/16" keyseated and fitted.
- 1 Shaft 2 7/16"x5' keyseated.
- 1 1 15/16" Eccentric Bos.
- 1 36x6x2 7/16 Spur Iron Friction Wheel keyseated and fitted.
- 1 Shaft 27/16"x3' 6" keyseated.
- 1 9 Tooth Sprocket Wheel for No. 104 Chain, bore 2 7/16".
- 1 Bevel Gear 55 Teeth  $1\frac{1}{4}$  pitch,  $3\frac{3}{4}$  face, bore 2 7/16 keyseated and fitted.
- 1 Shaft 1.15/16" $\times 6$ ' keyseated.
- 1 Bevel Pinion 14 teeth,  $1\frac{1}{4}$  pitch,  $3\frac{3}{4}$  face, bore 1 15/16 keyseated and fitted.
- 1 Shaft 1 15/16x3'.
- 1 9 Tooth Sprocket Wheel for No. 104 Chain, bore 1 15/16" keyseated and fitted.
- 1 Shaft 2 7/16"x4' keyseated.
- 1 9 Tooth Sprocket Wheel for No. 104 Chain, bore 2x7/16" keyseated and fitted.
- 1 Spur Gear 60 tooth  $1\frac{1}{4}$ " pitch,  $3\frac{1}{4}$  face, bore 1.15/16" keyseated and fitted.
- 1 Spur Pinion 15 tooth,  $1\frac{1}{4}$  pitch,  $2\frac{1}{4}$  face, bore 1 15/16" pitch keyseated and fitted.
- 1 Shaft 1 15/16x5' keyseated.
- 2 9 Tooth Sprockets for No. 104 Chain, bore 1 15/16" keyseated and fitted.
- 1 Shaft 2 7/16"x4' keyseated.
- 1 9 Tooth Sprocket Wheel for No. 104 Chain, bore 2 7/16, keyseated and fitted.

- 1 Spur Gear, 60 tooth,  $1\frac{1}{4}$ " pitch, 3" face, bore 2.7/16" keyseated and fitted.
- 1 Shaft 1 15/16"x4' keyseated.
- 1 Spur Pinion 15 tooth,  $1\frac{1}{4}$ " pitch,  $3\frac{1}{4}$  face, bore 1 15/16, keyseated and fitted.
- 1 9 Tooth Sprocket Wheel for No. 104 Chain, bore 1 15/16" keyseated and fitted.
- 1 Shaft 2 7/16x8' keyseated.
- 1 12x8x2 7/16" Spur Paper Friction, keyseated and fitted.
- 1 Spur Gear 60 tooth  $1\frac{1}{4}$ " pitch, 3" face, bore 2.7/16" keyseated and fitted.
- 1 Shaft 27/16x7' 8" keyseated.
- 1 Spur Pinion 15 tooth 1½" pitch, 3½" face, bore 2 7/16 keyseated and fitted.
- 1. 24x6x1 15/16" Spur Iron Friction Wheel keyseated and fitted.
- 1 Shaft 1 15/16x7′ 8″ keyseated.
- 1 8x7x1 15/16 Spur Paper Friction keyseated and fitted.
- 1 16x6x1 15/16" Phillips Steel Pressed Pulley keyseated and fitted.
- 1 1 15/16" Eccentric Box.
- 1 80' of 2 15/16" shaft in four lengths coupled together with three pair of 2 15/16" safety flange couplings.
- 2 Shafts 2 7/16"x20' coupled together with one pair of 2 7/16 safety flange couplings, and coupled to above length of 2 15/16" shaft with 1 15/16"x 2 7/16 reducing safety flange coupling.

- 1 36" Sproket Wheel for No. 124 Chain keyseated and fitted.
- 3 Bevel Pinions, 14 tooth, 1½" pitch, 3¾" face, bore 2 7/16", keyseated and fitted.
- 3 Shafts 2 7/16"x5' keyseated.
- 3 Bevel Gears 55 teeth,  $1\frac{1}{4}$ " pitch,  $3\frac{3}{4}$ " face, bore 2 7/16. Keyseated and fitted.
- 3 Shafts 1 15/16x16' keyseated.
- 6 12 Tooth Sprocket Wheel for No. 74, bore 1 15/16. Keyseated and fitted.
- 3 12 Tooth Sprocket Wheels for No. 74 Chain, bore 1 15/16" keyseated and fitted.
- 1 12 Tooth Sprocket Wheel for No. 78 Chain, bore 1 7/16" keyseated and fitted.
- 3 12 Tooth Sprocket Wheel for No. 78 Chain, bore 1 7/16, keyseated.
- 1 Shaft 2 7/16"x7' 6" keyseated.
- 1 36"x8"x2 7/16" spur iron friction wheel keyseated and fitted.
- 1 12 Tooth Sprocket Wheel for No. 124 Chain, bore 2 7/16" keyseated and fitted.
- 1 10 Tooth Sprocket Wheel for No. 78 Riveted Chain keyseated and fitted.
- 1 Pacific Coast Standard Wood Saw Machine, for cutting 4' slabs into 16" lengths.

200' of No. Chain.

180' of No. 104 and C. Chain.

4 320' of No. 104 and C. Chain.

40' of No. 124 Chain.

900' of No. 74 Chain.

90' of No. 78 Chain (Sec. 24).

90' of No. 104 and C. Chain (Sec. 37).

3000' of No. 74 Chain with "n" attachment every third link (Slasher).

25' of No. Riveted Chain.

- 1 Shaft 2 7/16x2' keyseated.
- 1 Spur Gear 24x3 keyseated and fitted.
- 1 9 Tooth No. 104 Sprocket bore 2 7/16 keyseated and fitted.
- 1 Shaft 1 15/16x3' 6".
- 1 Spur Pinion 12 Tooth, 1½" pitch, 3½ face, key-seated and fitted.
- 1 Sprocket 9 Tooth No. 104 bore 1 15/16.
- 13 2 7/16 flat boxes.
- $30 \ 1 \ 15/16 \ \text{flat boxes}.$ 
  - 2 2 15/16 flat boxes.
  - 4 2 3/16 flat boxes.
  - 4 3 15/16 flat boxes.
  - 1 1 15/16 eccentric box.
  - 2 2.7/16 eccentric box.
- $15 \ 1 \ 15/16$  set collars.
- 14 2 7/16 set collars.
  - 4 2 15/16 set collars.
  - 2 2 3/16 set collars.
  - $3 \ 3 \ 5/16$  set collars.
- 10 2 7/16 flat boxes.
  - 4 2 15/16 flat boxes.
- 22 2 7/16 set collars.
  - 1 shaft 2 7/16x22'.
  - 3 12T No. 78 sprockets.
  - 1 36x8 double friction.
  - 1 1 15/16x11' 8" shaft K. S.

## 14 F. T. Meyer vs. Pacific Machinery Co.

- 1 10x9 bevel paper friction Ftd.
- 1 18x8x1 15/16 C. I. pulley.
- 1 16x6x1 15/16 C. I. pulley.
- 1 1 15/16x5' 6" shaft K. S.
- 1 bevel gear 9 1/16x3½ 1 15/16 ftd.
- 1 20x6x1 15/16 C. I. pulley.
- 1 9T No. 74 sprocket 1 15/16 ftd.
- 1 1 15/16x5' shaft K. S.
- 1 No. e301 double pinion ftd.
- 1 24x6x1 15/16 C. I. pulley.
- 1 3 15/16x16′ 6″ shaft K. S.
- 1 Pr. No. 1474 double mortise gears ftd.
- 1 1 15/16x3' K. S.
- 1 9T No. 104 Sprocket 1 15/16 ftd.
- 1 shaft 2 7/16x24 K. S.
- 2~15T~78 sprockets 2~5/16 ftd.
- 1 12T No. 98 sprocket 2 7/16 ftd.
- 1 bevel gear 32x5 ftd. 2 7/16.
- 1 shaft 1 15/16x6' K. S.
- 1 bevel pinion  $7\frac{7}{8}$ x5 1 15/16 ftd.
- 1 shaft 2.7/16x3' 6" 1 end turned to 2.3/16.
- 1 sprocket 13T No. 87 2 7/16 ftd.
- 1 24x6x1 15/16 C. I. pulley.
- 1 shaft 2 7/16x3′ 8″ K. S. end turned to 2 3/16.
- 1 sprocket 9T No. 104 ftd.
- 1 shaft 3 7/16x6′ 3″ K. S.
- 1 shaft 3 15/17x12' 8" K. S.
- 1 Pr. 3 15/16x3' 7" clutch couplings ftd.
- 1 shaft 3 15/16x14'.
- 1 Pr. 3 15/16 flange shaft coupling ftd.
- 5 2 3/16 flat boxes.

27 2 7/16 flat boxes.

1 1 15/16 shifter hub and fork.

1 26x1 15/16 S. S. pulley.

1 26x6x1 15/16 S. S. pulley.

1 24x8x2 7/16 S. S. pulley.

1 8x4x2 7/16 W. S. pulley.

1 30x8x2 7/16 S. S. pulley.

1 27/16 shifter hub and fork.

1 36x6x1 15/16 S. S. pulley.

1 36x4x1 15/16 S. S. pulley.

1 1 15/16x3' shaft.

1 20x4x1 15/16 S. S. pulley.

 $20 \ 1 \ 7/16$  solid boxes.

1 shaft 2 7/16x19' 6".

1 shaft 2 7/16x9' 6" K. S.

1 shaft 1 15/16x20' K. S.

1 shaft 1 7/16x16' K. S.

1 shaft 1 15/16x20' K. S. per sketch.

1 shaft 1 15/16x20'.

1 shaft 2 7/16x20' K. S.

1 shaft 2 7/16x16' K. S.

2 Pr. 1 15/16 couplings ftd.

1 Pr. 27/16 couplings ftd.

1 Pr. 3 15/16 couplings ftd.

2 shaft 2 7/16x3' 6" K. S. all except 8" on each.

1 shaft 27/16x6 7" K. S. all except 8" on each.

1 shaft 2 7/16x3' K. S. all except 8" on each.

2 shafts 2 7/16x10′ K. S. all except 8″ on each. Lath machine to be furnished for an additional price of \$350.00.

1 16x6x3 15/16 W. S. pulley.

- 1 14x8x8 3 15/16 W. S. pulley.
- 1 12x8x3 15/16 W. S. pulley.
- 1 8x6x3 15/16 W. S. pulley.
- 1 12x8x2 15/16 S. S. pulley.
- 2 10x6x2 15/16 S. S. pulley.
- 1 40x8x2 7/16 S. S. pulley.
- 1 30x12x2 7/16 S. S. pulley.
- 1 26x10x2 7/16 S. S. pulley.
- 1 24x10x2 7/16 S. S. pulley.
- 2 24x8x2 7/16 S. S. pulley.
- 1 20x10x2 7/16 S. S. pulley.
- 1 18x8x2 7/16 S. S. pulley.
- 1 16x10x27/16 S. S. pulley.
- 1 8x6x2 7/16 W. S. pulley.
- 1 shaft 1 15/16x20.
- 1 shaft 1 15/16x11'.
- 180' No. 78 riveted chain.
- 90 only 78 B attachments.
- 20'87 riveted chain.
  - 5 sheets of red friction paper.
  - 2 27/16 set collars.
  - 4 2 7/16 wood pulley bushing.
  - 1 shaft 1 15/16x7′ 3″ K. S.
  - 1 32x8 S. S. pulley.
  - 1 box 55-lb. sterling babbitted.
- 10'74 chain N. attachments every other link.
  - 1 3 15/16 flat box.
- $12 \ 1 \ 15/16$  set collars.
  - $6\ 2\ 7/16$  set collars.
  - 1 14x6 steel split pulley.
  - $2 \cdot 16x4x1 \cdot 15/16$  steel split pulley.

- 1 10x4x1 15/16 steel split pulley.
- 1 6x3x115/16 wood split pulley.
- 8 11/16 set collars.

10x17/16 solid boxes.

- 6 1 15/16 flat boxes.
- 5 27/16 flat boxes.
- 1 2 7/16 eccentric boxes.
- 1 exchange of one  $6x7\frac{1}{2}$  sterling vertical engine for 1-4x5 engine.

Filed November 13, 1913.

A. M. CANNON, Clerk.

And afterwards, to-wit, on the 2nd day of December, 1913, there was duly filed in said Court and cause, an Answer, in words and figures as follows, to-wit:

#### ANSWER.

Now comes the defendant and for answer to the Amended Complaint of plaintiff herein filed:

I.

Admits the allegations contained in Paragraph I of said Amended Complaint.

IT.

Defendant admits the allegations contained in Paragraph II of said Amended Complaint.

III.

Defendant denies each and every allegation con-

tained in Paragraphs III and IV of Plaintiff's Amended Complaint.

#### IV.

Answering Paragraph V of Plaintiff's Amended Complaint defendant denies each and every allegation therein contained except that this defendant admits that on or about November 10th, 1909, the Oregon City Lumber & Manufacturing Company, a corporation organized and existing under the laws of the State of Oregon, as alleged in Plaintiff's Amended Complaint, made an assignment for the benefit of its creditors to John J. Cooke and John W. Moffitt, and that said John J. Cooke and John W. Moffitt, as such assignees, duly and in accordance with law, and on or about the 21st day of April, 1911, sold and delivered all said property to this defendant.

### V.

Answering Paragraph VI of said Amended Complaint, this defendant denies that such property is of the value of Seventy-two Hundred Dollars (\$7200.00), or of any greater value than Fifteen Hundred Dollars (\$1500.00).

#### VI.

And this defendant for a further and separate answer and defense herein, alleges:

That on or about the 10th day of November, 1909, the Oregon City Lumber & Manufacturing Company was a corporation, organized and existing under the laws of the State of Oregon, and was the legal owner and in possession in Clackamas County, Oregon, of all the property mentioned in Plaintiff's Amended Complaint; that on said 10th day of November, 1909, said corporation being in failing circumstances, made an assignment for the benefit of all its creditors to John J. Cooke and John W. Moffitt and executed in due form of law a deed of general assignment under the laws of the State of Oregon, which deed was executed and acknowledged so as to entitle it to be recorded, and was duly recorded in Book 3, page 205, Record of Deeds for Clackamas County, Oregon, where said property was situated; that said assignees duly qualified as such and accepted said trust and immediately went into possession of all said property.

That on or about the 21st day of April, 1911, said John J. Cooke and said John W. Moffitt, as such Assignees, in accordance with law duly sold all said property at public auction to the highest and best bidder for cash in United States Gold Coin; that prior to said sale, said sale was duly advertised according to law and plaintiff had due notice of said sale and of the time and place when the same was to take place, and the terms thereof, and was represented at said sale by ——— Garrett, its General Agent and Manager.

That at said sale this defendant bid in the said property and the whole thereof and became the purchaser of all said property and the same was delivered to him by said John J. Cooke and said John W. Moffitt and defendant went into possession thereof at once and defendant has ever since remained and now is in possession of the same.

That at said sale the said plaintiff was present by its General Agent and Manager, —— Garrett, and made no objection to said sale and made no claim to said property, or any part thereof, and consented to said sale.

That at such sale this defendant was the highest and best bidder and bought said property at public auction in good faith and for full value.

That neither said John J. Cooke nor John W. Moffitt nor this defendant ever had any notice or knowledge that there was any actual or pretended defect in the title to said property, or that plaintiff claimed that it had any interest in said property except as a general unsecured creditor of said Oregon City Lumber & Manufacturing Company, and this defendant alleges that he was on said April 21st, 1911, ever since has been and now is a bona fide purchaser in good faith for full value of all said property.

And this defendant alleges that plaintiff by reason of its participation in said sale and because it stood by and permitted this defendant to purchase the same at said sale in the manner and under the conditions hereinabove alleged, is and of right ought to be forever estopped to set up any claim or title to said property, or any part thereof as against this defendant, and particularly the claim set out in Plaintiff's Amended Complaint.

And this defendant further alleges that when said personal property was sold by plaintiff on said 29th day of April, 1909, it was sold for the purpose of being used in a lumber and planing mill, and plaintiff had actual knowledge that it would be used for that purpose. That upon its being delivered on said April 29th, 1909, to said Oregon City Lumber & Manufacturing Company, it was immediately, with plaintiff's knowledge, used for the purpose above set out, and a large portion of it became attached to and a part of the realty of said mill and became a fixture that could not thereafter be removed, and defendant alleges that the said personal property was attached and is a part of the realty and not subject to replevin.

Wherefore, defendant having fully answered, asks to be hence dismissed with judgment for his cost and disbursements.

DOLPH, MALLORY, SIMON & GEARIN, Attorneys for Defendants.

State of Oregon,
County of Clackamas.

I, F. J. Meyer, being first duly sworn, depose and say that I am the defendant in the above entitled action; that the foregoing answer is true as I verily believe.

F. J. MEYER.

Subscribed and sworn to before me this 1st day of December, 1913.

(Seal) E. C. LATOURETTE,

Notary Public for the State of Oregon.

Filed December 2, 1913.

A. M. CANNON, Clerk.

And afterwards, to-wit, on the 8th day of January, 1914, there was duly filed in said Court and cause, a Reply, in words and figures as follows, to-wit:

#### REPLY.

Comes now the Pacific Machinery Company, a corporation, plaintiff herein and for reply to answer of defendant heretofore served upon it, admits, denies and alleges as follows:

#### I.

Referring to paragraph six of said answer, plaintiff admits the allegations contained in the first paragraph thereof, being lines nine to twenty-two inclusive of page two of said answer.

#### II.

Referring to paragraph two of said paragraph six, beginning at line twenty-three of page two, plaintiff admits that property in question was sold on the 21st day of April, 1911, but alleges that it has no knowledge as to whether or not said sale was duly held in accordance with law or for cash

or to the highest bidder and therefore denies the same; and plaintiff further denies that it had due notice of, or was represented at said sale.

#### III.

Referring to paragraph three of said paragraph six, beginning at line thirty-one of page two of said answer, plaintiff alleges that it has no knowledge as to whether or not defendant is now in possession of the property in question and therefore denies the same.

#### IV.

Referring to paragraph four of said paragraph six, beginning at line four of page three of said answer, plaintiff denies that it was present at said sale or consented thereto.

## V.

Referring to paragraph five of said paragraph six, beginning at line eight of page three of said answer, plaintiff alleges that it has no information as to whether or not defendant purchased said property in good faith, or for full value and therefore denies the same.

## VI.

Referring to paragraph six of said paragraph six, beginning at line eleven on page three of said answer, plaintiff alleges that it has no information as to the truth or falsity of the matter therein and therefore denies the whole, and each and every part thereof.

#### VII.

Referring to paragraph eight of said paragraph six, beginning at line twenty-six of page three of said answer, plaintiff alleges that it has no information as to whether or not said property is attached to realty and has become a fixture and therefore denies the same.

IRA BRONSON, Attorney for Plaintiff.

State of Washington, County of King.

EDWARD I. GARRETT, being first duly sworn, on oath deposes and says: That he is the secretary of the Pacific Machinery Company, a corporation, plaintiff in the above entitled action; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

EDWARD I. GARRETT.

Subscribed and sworn to before me this 29th day of December, 1913.

(Notarial Seal)

H. B. JONES,

Notary Public in and for the State of Washington, residing at Seattle.

Filed January 8, 1914.

A. M. CANNON, Clerk.

And afterwards, to-wit, on the 14th day of August, 1916, there was duly filed in said Court and cause, an Opinion, in words and figures as follows, to-wit:

#### OPINION.

Bronson, Robinson & Jones, of Seattle,
Washington, for Plaintiff.
Dolph, Mallory, Simon & Gearin, of Portland,
Oregon, for Defendant.

# WOLVERTON, District Judge:

On April 29, 1909, the Pacific Machinery Company, plaintiff herein, through its manager Thomas Garrett, made a proposal to the Oregon City Lumber and Manufacturing Company as follows:

"We propose to furnish you machinery in accordance with attached specifications for the sum of \$4695.00, including a 11x14 Beck type engine feed, which is not mentioned in the specifications, delivery to be made at Portland. Terms to be \$1500.00 cash on arrival of the machinery, balance to be paid in equal payments of two, three, four, and five months dating from shipment of machinery. Transaction is to be covered by machinery contract, with notes on deferred payments bearing interest at 8%, notes to be endorsed by the company as well as by your Mr. Bohn and Mr. Collins, personally."

I call the paper a proposal for convenience, without assuming at this juncture to determine its legal effect.

In pursuance of the understanding thus had the Machinery Company furnished and delivered to the Lumber Company a large amount of sawmill machinery. The delivery began soon after the signing of the paper, and continued from time to time for the space of three or four months. The Lumber Company was not successful in its venture, and on October 28, 1909, made an assignment to John J. Cooke and J. W. Moffitt, as trustees, to sell the property and pay the creditors of the assignor. The deed of assignment carried with it whatever interest the assignor had in the mill machinery and supplies the Machinery Company had theretofore delivered to the Lumber Company in pursuance of the aforesaid proposal. Later, sale of the mill, including the machinery in question, a large amount of other machinery, and the lease of the premises upon which the mill was constructed, was advertised by the trustees. At the appointed time, or rather at a postponed date, the mill and lease were sold to the highest bidder, and bid in by the defendant F. T. Meyer, who now claims to be the owner of the whole. The plaintiff sues in replevin to recover the bulk of the machinery delivered by it to the Lumber Company, on the hypothesis that title never passed to the Lumber Company, but remained with the Machinery Company, and that such was the intendment and legal effect of the transactions had between the parties with reference to such machinery.

The cause was tried by the court without the intervention of a jury.

But two witnesses testified respecting the understanding of the parties at the time the proposal was signed and accepted. These were Thomas Garrett, manager of the Machinery Company, and William G. Bohn, president of the Lumber Company. Garrett says that there was a direct understanding that the sale was to be conditional, the vendor reserving title until the conditions were complied with. Bohn declares that it was not to be conditional, but absolute. Collins, who was present and participated in the negotiations, was not called as a witness. So that so far, the testimony of one witness stands against that of another.

Later, namely, on July 23, 1909, a conditional contract was presented to Bohn for execution on behalf of his company, together with a statement of account, with demand for the payment of that part of the purchase price then claimed to be due. Both the payment demanded and the signing of the conditional agreement were refused. Bohn says he objected to the payment because he thought his company was entitled to a discount for delay in shipping and certain changes made in the machinery delivered; and as to the proffered contract, he declares that he simply repudiated it as being a thing not agreed to.

In my view, the question whether title passed depends principally upon a proper construction of the paper which I have called a proposal.

It is at once manifest that the contract, if it can be so termed, was not intended to be the final word of the parties covering the transaction. It contains no terms of present sale, but a proposal to furnish machinery with delivery at Portland. Then follows the terms of payment. \$1500 was to be paid in cash on arrival of the machinery. was meant to be the place of arrival is somewhat obscure; probably Portland, as delivery was to be made at that place. The balance was to be paid in three installments, dating from shipment of machinery, the transaction to be finally covered by machinery contract, with notes on deferred payments. What was to be the nature of the machinery contract, whether a conditional sale contract or not, the paper does not disclose. But without the covering of the transaction by the machinery contract, it is plain the contract contemplated was not completed, whatever might have been in the minds of the parties as to the conditions to be contained therein.

It is in evidence, and not contradicted, that, although the machinery was furnished and delivery made to the Lumber Company, no cash consideration passed except \$100, nor were any notes executed, nor was the transaction covered by machinery contract, be that what it may.

Now, under such a tentative arrangement, can it be that a sale of the machinery was effected, and that the title passed out of the Machinery Company? Without appropriate words of sale, and with specific reservation for covering the transaction by another and definite and final contract, the paper discloses no intendment of a present sale. This, coupled with the further condition of a cash payment to precede the execution of the notes for deferred payments and the closing of the transaction by a final contract, is strongly persuasive of a purpose not to pass title at the time, but to reserve it until the condition of a cash payment was met and a formal transfer made by machinery contract. This interpretation is borne out by Lundberg v. Kitsap County Bank, 139 Pac. 769, a case of marked analogy to the present.

The conclusion having been reached that no title passed to the Lumber Company by the transaction, the defendant could acquire no title from or through it. Nor do I think the plaintiff is estopped from controverting defendant's alleged title by the conduct of its officers and counsel respecting the trustee's sale. The sale was conducted through notice and request for sealed bids, and the Machinery Company had no opportunity to previously notify the purchaser of its claim of title, nor was it required so to do.

Another contention is that the machinery became attached to and a part of the real estate, therefore the contract should have been recorded in the county clerk's office. But where no sale was intended, the inference is that there was no assent on the part of the vendor that the machinery should become a part of the realty. However this may be,

the manner in which the machinery was attached to the mill frame excludes the notion that it became part of the realty. Landigan v. Mayer, 51 Pac. 649.

The plaintiff is entitled to a verdict.

Filed August 14, 1016.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 19th day of September. 1916, there was duly filed in said Court and cause, the Findings of the Court, in words and figures as follows, to-wit:

#### FINDINGS.

Bronson, Robinson & Jones for Plaintiff. Dolph, Mallory, Simon & Gearin for Defendant.

Wolverton, District Judge:

The Court for verdict finds that the plaintiff is the owner and entitled to the possession of all the property described in plaintiff's complaint, except the last nine items on page 6 of the schedule attached thereto and all the items on pages 7 and 8 of such schedule save the last, and that the value thereof is \$4243.50.

CHAS. E. WOLVERTON, Judge.

Filed, September 19, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Monday, the 16th day of October, 1916, the same being the 90th Judicial day of the Regular July, 1916, Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

#### JUDGMENT.

This matter coming on regularly for hearing upon plaintiff's amended complaint, defendant's answer, and plaintiff's reply thereto, upon the 4th day of January, 1916, the plaintiff appearing by its attorneys, Bronson, Robinson & Jones, and the defendant appearing by his attorneys, Dolph, Mallory, Simon & Gearin, and evidence having been introduced, and the cause having then been continued until April 27, 1916, at which time further evidence was introduced, and the case having then been submitted to the court on written briefs, and the court having upon the 14th day of August, 1916, found as a verdict in the case that the plaintiff is the owner and entitled to possession of all of the property herein sued for, except the nine last items on page six of the schedule attached to its complaint and amended complaint, and all the items on pages seven and eight of said schedule, save the last, the same being the articles hereinafter referred to, and that said articles are of the value of Forty-two Hundred Forty-three and 50/100 (\$4243.50) Dollars; and the court having heretofore signed and

entered a judgment as prepared by the plaintiff, which does not with sufficient certainty identify the property to be recovered by the plaintiff, and whereas, the plaintiff and defendant have agreed to this amended form of entry of judgment for the purpose of more particularly identifying said machinery, which judgment shall operate to correct and supersede said former entry;

NOW, THEREFORE, it is ORDERED, AD-JUDGED and DECREED, that the plaintiff have and recover of and from the defendant the possession of all of the property sued for in this action, to-wit: all the property described in plaintiff's complaint, except the last nine items on page 6 of the schedule attached thereto and all the items on pages 7 and 8 of such schedule save the last, or that in the event that possession thereof be refused or not delivered, that the plaintiff have judgment against the defendant for the sum of Forty-two Hundred Forty-three and 50/100.(\$4243.50) Dollars, with interest thereon at the rate of six per cent per annum from the 19th day of September, 1916, and that the plaintiff recover its costs herein to be taxed.

Done in open Court this 16th day of October, 1916.

CHAS. E. WOLVERTON,

Judge.

Filed October 16, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 9th day of November, 1916, there was duly filed in said Court and cause, a Bill of Exceptions, in words and figures as follows, to-wit:

### BILL OF EXCEPTIONS.

Be it remembered that this cause came on regularly for trial in the above entitled Court, on the 4th day of January, 1916, and was continued and completed on the 27th day of April, 1916. The plaintiff appeared by its attorneys, H. B. Jones and Ira Bronson, the defendant by his attorneys, Dolph, Mallory, Simon & Gearin, the trial being before the Court, and the parties waiving a jury, and the following proceedings were had, to-wit:

It was stipulated between counsel that the description of the property sued for in the original complaint was the correct description and should be considered as applying to the amended complaint.

Without objection, the defendant was permitted to amend his answer to make it read that all of the property involved in the action became attached to and a part of the realty.

It was further stated by counsel for the plaintiff that plaintiff would not claim in this suit the following articles itemized in the list accompanying the original complaint, towit: commencing on line 28, page 6, of said list, continuing through the rest of that page, all on page 7, all on page 8, down to line 11, but not including the last item.

Testimony was offered on the part of the plain-

tiff tending to show that at the time that the Oregon City Lumber & Manufacturing Company entered into the agreement with the plaintiff to purchase the personal property for the possession of which this action was brought, the following letter (Plaintiff's Exhibit "A") was written to the Oregon City Lumber & Manufacturing Company by the plaintiff and accepted by said Oregon City Lumber & Manufacturing Co.:

"Portland, Oregon, April 29, 1909.

Oregon City Lumber & Mfg. Co.,

Oregon City, Oregon.

Gentlemen:

We propose to furnish you machinery in accordance with attached specifications for the sum of \$4695.00, including a 11x14 Beck type engine feed, which is not mentioned in the specifications, delivery to be made at Portland. Terms to be \$1500.00 cash on arrival of the machinery, balance to be paid in equal payments of two, three, four and five months dating from shipment of machinery. Transaction to be covered by machinery contract, with notes on deferred payments bearing interest at 8%, notes to be endorsed by the company as well as by your Mr. Bohn and Mr. Collins, personally.

Yours truly,

PACIFIC MACHINERY COMPANY,

Accepted:

Thos. Garrett, Mgr.

Oregon City Lumber & Manfg. Co.

By Wm. G. Bohn, Prest. George W. Collins." Edward I. Garrett, called as a witness on behalf of the plaintiff testified that for 21 years he had been engaged in the machinery business, that he was connected with the Pacific Machinery Co. at the time when the sale of the property herein involved was made to the Oregon City Lumber & Manufacturing Co., that he was familiar with the method of sale of machinery which is sold to Saw Mills and Lumber Mills on time, and that he was familiar with the use of the phrase "machinery contract." He was then asked by plaintiff's counsel the following question:

What is the significance of that phrase as used in the trade?

To this question the defendant then and there objected on the ground that it was incompetent and immaterial, which objection the Court overruled and to the said ruling duly allowed the defendant an exception.

Thereupon the witness answered:

It is a general term that is commonly used in the sale of machinery, whereby the vendor intends to retain title until the machinery is paid for.

Counsel for the plaintiff then asked the witness the following question:

How does it compare with the phrases "conditional sale?"

To which question the defendant then and there objected on the ground that it was incompetent and immaterial, which objection was overruled by the Court and an exception duly allowed the defendant.

The witness then aswered:

Synonymous.

The foregoing is all the testimony in the case upon the trade significance of the phrase "machinery contract" and is set forth for the purpose of illustrating the above exceptions.

Here follows a transcript of all the testimony given at the trial, the same being set forth in full to enable the Appellate Court to determine the correctness of the trial Court's rulings in refusing to make and find certain Findings of Fact and Conclusions of Law proposed by the defendant and in finding a general verdict and judgment in favor of the plaintiff.

Thomas S. Garrett, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

# Questions by Mr. Jones:

Mr. Garrett, during the year 1909 did you have any connection with the Pacific Machinery Depot?

- A. Yes, I was acting as their agent here.
- Q. Whereabouts were you stationed?
- A. At Portland.
- Q. Here at Portland?
- A. Yes.
- Q. During that year did you have any dealings

with the Oregon City Lumber & Manufacturing Company?

- A. Yes, I did.
- Q. What were they proposing to do at that time?
- A. They were remodeling a sawmill, adding additional machinery equipment.
- Q. Did they invite proposals from your house to furnish them certain of that machinery?
- A. Yes, we figured with them on furnishing them the machinery?
- Q. And did you finally enter into an arrangement with them to furnish some of it?
  - A. Yes, I did.
  - Q. And did furnish some of it?
  - A. Yes, I did.
- Q. Will you examine that list, Mr. Garrett, and state whether or not you can say whether or not that property was furnished?
- A. Yes, I can identify this as a list of the machinery which we furnished.
  - Q. That you furnished?
  - A. Yes.
- Q. Now, with whom did you deal as representing the Oregon City Lumber & Manufacturing Company in this transaction?
  - A. With Mr. Bohn and Mr. Collins originally.
  - Q. What positions did they occupy?
- A. Mr. Bohn was president of the company. Mr. Collins held some office—I don't recall what.

- Q. And what kind of an arrangement did you enter into with them for the furnishing of this machinery?
  - A. At the time of the sale, you mean?
- Q. Yes, or before the machinery was furnished to them.
- A. Why, in our customary way of handling such transactions, I explained to them that, as a great part of this machinery was made up specially, it would have to be sold on a contract whereby we retained the title to the machinery until it was paid for.
- Q. And did they agree to that kind of an arrangement?
- A. Yes. It was thoroughly talked over and agreed to.
  - Q. Can you identify this instrument?
  - A. Yes, I can identify that.
  - Q. What is that?
- A. That is the agreement that we drew up at the time of the sale.
  - Q. Who signed this here?
- A. That is signed by Mr. Bohn, the president of the Company, and this Mr. Collins that I speak of.
- Q. And you signed it there for the Pacific Machinery Company?
  - A. Yes.
- Q. And the specifications attached form part of the material described in that list in the complaint, do they?

- A. Yes, they were supposed to form a part of this contract matter.
  - Q. And when was this signed?
  - A. That was signed April 29.
- Q. Well, with reference to your negotiations, was it signed before you delivered the machinery?

A. Oh, yes.

Mr. JONES: I offer this instrument that the witness has just been referring to, as Plaintiff's Exhibit "A."

Mr. GEARIN: No objection.

Marked "Plaintiff's Ex. A" and reads as follows: (This instrument has been set forth above and is therefore omitted here.)

Attached to said Exhibit "A" was the following: "Specifications of Saw Mill Machinery for Oregon City Lbr. & Mfg. Co., Oregon City, Oregon, from Pacific Machinery Company, Portland, Oregon."

Q. Now, you stated, Mr. Garrett, that this property was to be sold with reservation of title in the vendor until it was paid for?

Mr. GEARIN: Now, Mr. Jones, this is before the court, and I don't want to be objecting, but don't lead him like that.

Mr. JONES: I thought that was pertinent and clear.

Mr. GEARIN: He is able to take care of himself.

Q. State, Mr. Garrett, what the arrangements was as to the title. What was the arrangement under which this property was sold?

Mr. GEARIN: Another thing, if the Court please, just to save the record. There is a written contract. That ends the discussion.

Mr. JOHNSON: Let me read this to the Court. (Reads Exhibit "A" as set out above.)

- Q. Now, was this machinery that was furnished under this contract, Mr. Garrett, of the reasonable value as stated in that agreement?
  - A. Yes, it was.
- Q. Did that cover all of the machinery mentioned in the complaint here?
  - A. I didn't understand your question.
- Q. Does this cover all the machinery mentioned in that complaint?
- A. No, that doesn't cover. At least the price in that doesn't cover. It was understood that there would be more machinery ordered later, which was to be covered by this same contract, which they were to give us, whereby we retained the title to it. In other words, there was machinery to follow to be sold on the same basis.
- Q. Can you show or tell what pages of the list in the complaint are covered by this contract, or rather by these specifications.

Mr. GEARIN: Mr. Jones, is it your understanding that that specification is correct?

Mr. JONES: Yes, it is my understanding that the specifications here is correct.

Mr. GEARIN: Very well. It may be so considered. We are not disputing these things.

Mr. JONES: Except for a couple of extras, that I am cutting out.

Mr. GEARIN: I want the Court to understand we do not dispute the things. They were there.

- Q. Which pages, Mr. Garrett, cover the machinery mentioned in these specifications?
- A. It is of such a similar character that I have to compare it pretty carefully.
- Q. Well, take your time. Compare it carefully. With counsel's permission, I will point out the first four pages here, Mr. Garrett, of this list, constitute the articles mentioned in there. If you will compare them now, and see if that is correct; see if they end the same place there.
- A. Yes. The machinery mentioned here agrees with these first four pages in this.

COURT: Is that the first four pages of Exhibit "A" attached to the complaint?

Mr. JONES: To the complaint, yes, sir.

Q. Was there a change from the specifications in furnishing a trimmer?

A. Yes.

- Q. What change was that, and what difference in price did it involve?
- A. The details of the design in trimmer were changed, and that involved an addition of \$350 in the price.
- Q. Was there a change in a small engine, Sterling engine?

- A. There was a small vertical engine which was changed to a larger size.
- Q. And what difference in price did that involve?
  - A. \$45.
- Q. Then the rest of the property mentioned in Exhibit "A" to the complaint was furnished in addition to the property specified in Exhibit "A" introduced in evidence?
  - A. Yes, it was.
  - Q. What was the value of that property?
  - A. It was \$1115.

COURT: Is that the value of all the property that is mentioned in that contract?

- A. That was machinery that was specified by the customer at a later date.
- Q. State how much of this machinery that you testified to first was furnished under the agreement which you mentioned awhile ago?
- A. All that we have discussed so far was under the same original agreement.
- Q. Now, Mr. Garrett, how long have you been in the machinery business?
  - A. Nearly 12 years.
- Q. And are you familiar with values of this class of machinery?
  - A. The values?
  - Q. Yes.
  - A. Yes.
  - Q. Are you familiar with the result of wear and

tear and the result of use of the machinery, depreciation in value?

- A. Oh, yes. I have to appraise mills quite often.
- Q. This suit, the record shows, I believe, was commenced in August of 1912, or about three years after the stuff was purchased. Assuming, Mr. Garrett, that this mill was quite idle during that time, can you state what would be the fair value of this machinery at the time the action was instituted, either by a depreciation, percentage, or any way of that kind?
- A. A conservative estimate of the depreciation would be 30 per cent. It should have had a value of 70 per cent.
  - Q. Of the original selling price?
  - A. Of the original selling price.
- Q. Property of this character placed in a mill is fastened in what manner?
  - A. Beg pardon?
- Q. In what manner is property of this kind fastened when it is placed in a mill?
- A. Practically all of it is merely held to its supports by machine bolts.
- Q. Can it be detached without injury to the mill-frame or not?
- A. Practically all of it—I don't know of any exceptions in this list—can be detached by merely unscrewing the nuts of the machine bolts.
  - Q. Would you state that all of the machinery

that you have testified was furnished could be detached without injury?

- A. Yes, I would say that all of it. I can't think of a single item that could not be.
- Q. Explain just what you mean by a machine bolt?
- A. A machine bolt is a piece of round iron, with a head on one end and a thread on the other, and the head is fastened to the foundation, and the end with the thread through it projects through the piece of machinery, and by screwing the nut on the machinery is attached to the foundation.
- Q. You said to unfasten the piece of machinery, you simply unscrew the nut and take the bolt out?
- A. Simply unscrew the nut and let the machinery loose.

#### CROSS EXAMINATION.

Questions by Mr. Gearin:

Your initials are what, Mr. Garrett?

A. T. S.

- Q. There are two of you? You have a brother, haven't you?
  - A. Yes, I have a brother.
- Q. And he is engaged in the Pacific Machinery Company, too, is he?
  - A. Yes.
  - Q. What position does he occupy?
  - A. President of the company.
  - Q. He is president, and what officer are you?

- A. I was their sales agent.
- Q. At that time?
- A. Yes.
- Q. What official position have you now, if any?
- A. Why, I am secretary of the company now.
- Q. This company is a going concern?
- A. Oh, yes; yes.
- Q. It is engaged in business here and in Seattle?
- A. Yes.
- Q. Who negotiated the sale with the Oregon City Lumber & Manufacturing Company?
  - A. I did that.
  - Q. Did you go up and see Mr. Bohn?
  - A. Yes, sir.
- Q. How did you come to know that they were in the market for that machinery?
- A. Why, we have a system of keeping in touch with new business-clipping bureaus—besides going around to the mills; and then allied businesses we keep in touch with.
- Q. It was in the ordinary course of your business that you found it out, and through no special arrangement of friendship or otherwise with these people?
  - A. No, sir.
- Q. So that, having heard that they wanted machinery, or that they were in the market for it, you went up there and looked over the plant, did you?
- A. Well, I looked over the plant. I wouldn't say that I looked over it with any great care pre-

vious to the sale. That was not required, as they did their own engineering in this instance.

- Q. Well, I mean you saw the place, and you knew what this machinery was to be used for?
  - A. Yes, sir.
  - Q. They were remodeling the mill, weren't they?
  - A. Yes, sir.
- Q. And they were going to put this machinery in there in order to have a better mill?
  - A. Yes, sir.
- Q. And who prepared these specifications—"Specifications of sawmill machinery for Oregon City Lumber & Manufacturing Co.," etc., that are attached to this contract? Do you know who prepared them?
  - A. I couldn't say accurately who did.
- Q. Well, is it likely that you people prepared them yourselves?
- A. No, sir. We didn't do the engineering in this instance.
- Q. Well, is it your understanding that Mr. Bohn or Mr. Collins or some officer of the company brought them down to you?
- A. Well, they either brought them down, or I called at their office, or they mailed them. In other words, we got them.
- Q. You think these specifications were prepared by them?
- A. Either by them or a man hired by them to do it.

Q. Who did the figuring so as to determine the amount you proposed to charge them? You?

A. We have estimating clerks do the figuring; but, as a rule, where I am trying to negotiate the sale, I look them over myself, so that I no doubt did in this instance.

Q. So that the terms were agreed as to the cost price? That was satisfactory to both of you, was it?

A. As far as we could go. It is customary in building sawmills to specify a certain amount of machinery, but while it might be possible, it is very seldom that all of the machinery which they will require is specified at the same time.

Q. There are always extras?

A. Yes.

Q. Now, then, for the amount of machinery set out and described in these specifications you agreed with the Oregon City Lumber & Manufacturing Company to charge them \$4695, including this 11x14 Beck Type Engine Feed, etc., which is not in the specification? That was agreed upon?

A. Yes.

Q. And the terms were \$1500 cash.

A. The terms were in accordance with that letter.

Q. Yes. And the balance in notes, bearing eight per cent interest; and that was signed. Did they pay you the \$1500 cash?

A. I believe they did not.

Q. Did they pay you any cash?

- A. I believe they paid us \$100.
- Q. Now, this contract bears date April 29, 1909. That is correct, is it?
  - A. Yes, sir.
- Q. How soon after that did you begin forwarding this machinery?
- A. Why, we began forwarding it almost at once.
  - Q. When did you get it all up there?
- A. I am not prepared to say when it was all shipped.
- Q. It doesn't appear by this contract when you are to ship it?
  - A. No.
- Q. How late do you suppose it would be safe to say the last of it got up there?
- A. I couldn't say offhand. They didn't furnish us the detailed specifications for all of this machinery immediately. As you can see, part of these detailed specifications were furnished at the time that the arangements for the sale and payments were made, but they didn't furnish the—
  - Q. All in this was described?
- A. Yes, but it was understood that there was more machinery to follow, which was to be on the same basis; and on account of their being in a hurry, or held up on the engineering, or one thing or another, they were only able to specify part of it at this time.
  - Q. Well, there was nothing to keep you from

furnishing them the part of it that was in the specifications?

- A. No, sir. I might qualify that statement when I say there was nothing to stop us. There were some few things, which I suppose come in the natural course of business, discrepancies between their specifications and blue-prints, one thing and another, which very commonly occur.
- Q. This 11x14 Beck Type Engine Feed, you knew you had to furnish that?
  - A. Oh, yes.
- Q. Now, then, it went along, and when did you next have any dealings with this Lumber Company—Oregon City Lumber Company, or with Mr. Bohn, its president? This now is April 29th, when you signed up? Now, when did you next have any dealing with them?
- A. Well, I might say on April 30th. We were in constant touch with them.
- Q. Well, you were by sending things back and forth?
- A. They had an office here in the city. Our office was here in the city.
- Q. When did you next have any arrangement with them, or dealing with reference to money—paying for this?
  - A. I couldn't say offhand.
  - Q. Oh, but sufficiently near it?
- A. No, I couldn't say, because the entire question of what the terms of payment were, and the

conditions, were settled at this time for all of it. And subsequent to that, I cannot say when we next tried to get them to carry out their agreement made at this time.

- Q. That is what I want to find out now. When did you come to them? When did you come to them to say that "We want you to carry out this agreement," and they refused?
- A. I am sorry, but I am not hardly qualified to say that. I couldn't give you that information. I don't know.
  - Q. Could you get anywhere near it?
  - A. No, I am afraid not.
- Q. Did you ever, yourself, personally, have anything to do with it?
- A. Well, as I say, I was a sales agent for the company, and it was not my business to follow credits through and see that conditions of contracts in regard to payment of money were followed out.
- Q. Well, you probably, then, didn't have anything further to do with it, did you? Someone else did that, maybe?
- A. Yes, someone else followed it up, yes. Correct.
- Q. When you got this contract, and attended to the shipping of the stuff, was your business through then, and passed over into the hands of someone else?
- A. It was through except for what help I could give. Theoretically it was through.

- Q. This contract calls for notes on deferred payments. Did you draw up those notes, or do you know anything about them?
  - A. I did not draw them up.
- Q. That was somebody else. When did you go up to the mill in Clackamas County? There was a failure—that is admitted in your pleadings?
  - A. Yes, sir.
- Q. And they assigned for the benefit of creditors, and that is duly admitted. Now, with reference to that, when did you go up to see them up there in Clackamas County?
- A. As I say, that matter was not in my hands. I was responsible only for the selling of this machinery, and any failure or anything like that, while I might have been out there to the mill to look at the machinery, one thing and another, any collections, anything like that, were not in my hand. I cannot give you any information about it.
- Q. Do you recall whether you were up there at all or not?
- A. Do you want to know whether I have been to Oregon City after that? I was. I was at the mill after that.
- Q. Were you there the day the bids were opened for the sale of this property?
  - A. No, sir, I was not.
- Q. It is pleaded that Garrett. Would that be likely to be your brother that is pleaded there, or you?

- A. Well, I couldn't say. I was not there.
- Q. You were not there. So you don't know anything about that?
  - A. I know nothing about the sale of it.
- Q. Do you remember seeing the notice of the sale?
- A. Well, I think there is no doubt but what I had seen a notice of it.
- Q. I have here a printed slip. I will ask you to look at it, and see if you recall seeing that?
- A. It is probable that I did. I cannot say that I did not see that. It is probable that I did see this same notice.
- Q. Are you able to say now that you did see it or not? I don't know that you did. I am just asking you.
- A. I couldn't identify it exactly, but I knew that such a notice was out.
- Q. You knew that there was such a notice advertising that sale?
- A. Yes. I couldn't identify it as this same thing, but I know there was such a notice.
- Q. So that you have now testified practically to all that you can recall as to this contract with the Oregon City Lumber & Manufacturing Company, and the terms of it, and the material that was furnished under it, have you?
- A. I believe so. I have stated all that there was to it.
  - Q. This other stuff that is not included in the

specifications attached to the contract, was furnished by their order later on, I take it, when they found they wanted it, or for some other reason?

A. This other material, the amount of which was \$1115, was material that they were unable to specify in April, because of a delay in their engineering department in making out these specifications.

Q. It was of the same general nature as this?

A. Oh, yes.

Q. And it was for the purpose of being used in that mill, and was used there?

A. Yes.

Q. You know Mr. Latourette, do you, Mr. Garrett?

A. I do.

Q. You know where his office is in Oregon City?

A. Yes, sir.

Q. Weren't you up there in his office previous to this sale, talking to him about the sale, and with reference to buying the property in at the sale?

A. In reference to buying it in?

Q. Or him, or anybody, or the sale generally?

A. Well, it is quite possible that—I have been in Mr. Latourette's office a number of times, but I didn't discuss with him then buying it in, be-

cause that is something I have nothing to do with. It is out of my—

- Q. What I mean, Mr. Garrett, is, you were up there, and you were interested in this property, and Mr. Latourette was interested in it, and you did have several conversations with him concerning the general situation of the property, didn't you? Is that correct?
- A. I don't recall discussing the matter with Mr. Latourette, because that wasn't—I had no authority to do that.
- Q. No, I am not trying to bind you by it at all; but I just want to know if you recall the conversation.
  - A. No, I don't recall any conversation.

## RE-DIRECT EXAMINATION.

- Q. Your brother, Edward I. Garrett, was down here a number of times about this matter?
  - A. Yes.
  - Q. Where is he now?
  - A. He is in the East at the present time.
  - Q. Why is he not present out here?
- A. Why, he was in the East on business, and he has been ill there; he has had typhoid feyer.
- Q. He has been detained there by illness for several months, hasn't he, in the East?
  - A. Yes, sir.

## RE-CROSS EXAMINATION.

Q. I have here a paper which purports to be an agreement among the creditors of the Oregon City Lumber & Manufacturing Company, signed Pacific Machinery Company, by Ira Bronson, attorney. I will ask you to look at that—signed by all these different people. I will ask you if you ever saw that before, or if you know anything about it. I don't care about that, Mr. Garrett, if you don't recall it. I don't know that you do. Mr. Bronson will know all about it, but maybe you do.

A. I myself don't recall that. That would be out of my—

Excused.

Ira Bronson, called as a witness on behalf of the plaintiff, being first duly sworn testified as follows:

#### DIRECT EXAMINATION.

Questions by Mr. Jones:

Mr. Bronson, what was your connection with the Pacific Machinery Company at the time of these transactions?

- A. I was attorney for the company.
- Q. Did you make one or more trips down here to look into this matter?
  - A. Yes.

(Testimony of Ira Bronson.)

- Q. Did you make a trip down here before the sale by the assignees to the defendant?
  - A. Yes.
  - Q. Who was with you?
- A. Mr. T. S. Garrett went down with me once to look at the records.
  - Q. Went down where?
- A. Down to Oregon City. And Mr. Edward I. Garrett went down with me subsequently.
- Q. And at either or both of those times did you have any conversation with the defendant Meyer?
  - A. Yes.
  - Q. This was before the sale, was it?
- A. It was the day that the bids were to be opened, and were opened.
- Q. And will you state what conversations you had with him at that time?
- A. Well, the conversation followed an investigation at the hands of the trustees who had this property in hand.

COURT: Trustee or assignee?

A. The assignees, I should say; the assignees of the company; and the substance of the conversations was very largely an effort to arrive at some kind of a judgment by which we could have a peaceable claim and lien on this machinery of ours, and keep it, or by which they would take our claim over and buy it, or by which they would turn over the whole property to us—their prop-

(Testimony of Ira Bronson.)

erty and everything—to sell, if Mr. Garrett could persuade them that he was more capable, that is, had a larger experience and larger possibility in the machinery business than theirs.

- Q. That proposition was to take over just this property?
  - A. No, take it all.
  - Q. Take the whole building?
- A. Yes. We couldn't arrive at any result on that. I talked with Mr. Meyer; I talked with Mr. Latourette. I suppose we spent an hour or two, off and on.
- Q. Did you notify Mr. Meyer or Mr. Latourette that the Pacific Machinery Company had a claim against this stuff?
- A. Oh, that was what we were talking about all the while. There was no question about that. They know what our claim was. We were asserting it, and dickering with them trying to arrive at some result. And we couldn't arrive at any result, so I notified them that we should maintain our rights in that property, and take such steps legally as we could to enforce them.
- Q. What rights did you claim to them, if any, that you had in this property?
- A. We claimed to own this particular property that was sold under this conditional sale.
- Q. Did you or Mr. E. I. Garrett, or Mr. Thomas Garrett, at any time in your presence, consent to the sale of this property by the as-

(Testimony of Ira Bronson.)

signees to the defendant, free of any claim on the part of the plaintiff?

- A. No. We never consented to it in any way, shape or form. Mr. Edward I. Garrett and I were there together, were there constantly together, all during that late forenoon and early afternoon.
- Q. Is there any other statement about this matter you want to make?
  - A. Nothing that I think of.

### CROSS-EXAMINATION.

Questions by Mr. Gearin:

Mr. Bronson, you were representing at that time the Pacific Machinery Company as their attorney?

- A. Yes, sir.
- Q. You came down to look after it?
- A. Yes, sir.
- Q. You had seen this notice of the sale, hadn't you?
- A. I have no doubt that I had seen it. I don't recall the language of the notice. We knew there was a sale advertised.
  - Q. You knew it was to take place at that time?
- A. Yes, we knew all about that. I think it may be assumed that we saw that notice. I don't recall absolutely.

Mr. GEARIN: I will ask to have the notice marked for the purpose of identification. I will afterwards prove it.

Marked for identification "Defendant's Ex. 1."

Q. Were you on the ground when the sale did take place?

A. We went—my recollection of it is that we went to the office of these assignees, Mr. Moffitt, and a Mr. Cooke, I think.

Q. You knew that they were the assignees under this assignment?

A. Oh, yes, yes, and that bids had been called for on this proposition, and we wanted to investigate and find out what they proposed to do, and then we wanted to talk to Mr. Latourette; and exactly whether we were present when those bids were opened, or whether the communication was made to us immediately afterwards, I don't know; but then it was either at the time or immediately afterwards that we had our first conversation with the defendant in the bank.

Q. Now, this notice, assuming it to be correct, announces that they will, on April 20, 1911, receive sealed bids, etc.; and I may say that that is correct, and will be proven. Now, you knew immediately after the bids were opened, anyhow, what the bid was, did you not?

A. I must have known. I don't recall just what it was now.

Q. You were up there for that purpose?

A. Yes, sir, certainly, we were there for that purpose. I don't mean by that purpose that we were there to buy the property. I mean we were there in connection with it, and to either arrange

with the defendant and Mr. Latourette to take over our property, or to let us deal with them, or else to notify them of our rights.

- Q. Well, you were there because these trustees were proposing to deal with this property and sell it?
  - A. That is it exactly.
  - Q. You were up there to look after it?
  - A. Yes.
- Q. And then you had a conversation with Mr. Latourette—several of them—didn't you?
  - A. Oh, yes, yes.
- Q. Before the sale? Before these bids were opened?
- A. We had no extensive conversation with Mr. Latourette, I think, until after the bids were opened. We had quite a long conversation with Mr. Latourette, if I remember right, right after lunch; but we had a little, just a little preliminary talk with him before.
  - Q. You didn't make any bid on anything?
  - A. No, sir.
- Q. Now, I will show you this paper, Mr. Bronson, dated "Portland, Oregon, Dec. 9, 1909," signed "Pacific Machinery Co. By Ira Bronson, Attorney, approximately \$5724.85," and ask you to look at it, and see if you recall the circumstance of your signing it, and explain to the Court what that paper is, and why it was signed.
  - A. Yes. I remember fairly accurately what the

circumstances were. A Mr. Bohn, a brother of Mr. Bohn, the president of the Oregon City Lumber & Manufacturing Company—if that is the technical name of the company—came up to my office in Seattle. It seems to me it was in an evening after dinner, but it may have been in the afternoon; and said they were proposing to try and reorganize this proposition, and wanted to know whether or not we would release our claim on that machinery—in other words, turn it in, and take a position as a common creditor; and that he was going to reorganize it and put a lot of money in it, and people in Minneapolis—he had ample funds to pay off the whole business.

#### Q. Who was this?

A. Mr. Bohn, the brother of the Mr. Bohn the president of the company; and that it was going to be a good thing for Oregon City, of course, and all that, and they wanted to build this thing up—they were going to build a railroad. I told him that I was willing, without consulting the officers of the company to assure them that if they would do that, and get all of the creditors to join in it, to say that the Puget Sound Machinery Depot would join in the proposition,—I have not read this recently, but I see my signature there,—and that we would do what was decided in this agreement. And I told himwell, I am not absolutely positive as to what I said about when I would surrender the document, etc. I cannot recall that now. However, it was to be dependent upon his securing the consent of all of

the creditors and putting this money into the proposition, and we didn't secure all of the creditors to do it.

- Q. Nothing came of this?
- A. Nothing came of that at all, as far as I know.

Mr. GEARIN: We offer this in evidence.

Marked "Defendant's Exhibit 2."

- Q. Now, after this sale up there—I term a sale where they opened the bids and concluded this transaction as shown by that advertisement—when did you next have any conversation with any of those people, Mr. Bronson, you representing the Pacific Machinery Company?
- A. I don't recall right at this minute, Mr. Gearin, when the next one may have been. I don't now recall having any conversation with Mr. Latourette, the president, I think, of the bank. I may have had.
- Q. You understood Mr. Latourette was the president of the bank up there, who had a claim against this, and that he was also the attorney representing it?
- A. No. I may be mistaken, but I assumed that Mr. Latourette who was attorney was not president of the bank. I may be wrong about that.
  - Q. Well, it is this Latourette, anyway?
  - A. Well, there are two of them.
- Q. I know. Did you ever have any conversation with the other one at all?
  - A. Yes: yes.

- Q. Oh, well; now, when did you?
- A. It is the other one, in the bank, that I refer to as having bad the long conversation with in the afternoon.
  - Q. Up there?
  - A. Yes.
  - Q. This is Charles Latourette. Not this one?
  - A. Yes, it was the other one.
- Q. So that up to the time of the sale up there you didn't have any conversation with Mr. Charles Latourette, who is here?
- A. I don't recall that I did. My first conversation was with Mr. Meyer in the bank, if I remember right, when we went early in the morning. The first thing we did was to go and see Mr. Meyer.
- Q. Well, now, after that, do you recall the time that you had a conversation with Mr. Charles Latourette, who is now here?
- A. Oh, yes; but I think that was a long while afterwards.
  - Q. How long afterwards?
- A. Well, that would be pretty hard for me to say. My mind might be recalled to it, but I don't recall now about it.
- Q. Well, you can state the substance of the conversation, whenever it took place. It did take place?
- A. The substance of that conversation was that we would like to settle this controversy, and get some kind of a proposition out of it. It would either

mean their paying us some money and taking our claim over, or agreeing to selling the property, we to waive any claim we had, and let them have the title—that is, not assert a title against them—and give us some of the proceeds, some proportion of the proceeds, on the theory that we were both creditors in this proposition. That is the substance of it. I cannot give you the words.

Q. You had one or two or several conversations with him?

A. I don't recall more than three, one of which was this forenoon.

Q. Well, I mean before this suit was brought?

A. I think two before.

Q. Before the suit was brought?

A. I wouldn't contradict Mr. Latourette if he said it was oftener than that, but I don't recall it.

Q. I guess probably you are right about it. There was nothing resulted from the conversation?

A. Nothing resulted, no. We never could get together at all.

Mr. GEARIN: I think that is all, Mr. Bronson.

A. I would like to explain one thing that is recalled to my mind, if I may refer to that instrument you had me identify, please. I just noticed I signed this claim as \$5724.86. I was, of course, acting on my own responsibility, as I said, and I assumed that the claim was of the amount as secured in the original agreement plus about \$1100. Now, whether the amount is correct or not there, I do not know.

I simply assumed that to be as near correct as my figures would justify.

- A. I would like to add this to what I have testified to, that is, we discussed with the assignees our claim, and notified them before they made any sale, at this time when we were down there, what we asserted our rights to be.
  - Q. You discussed with Cooke and Moffitt?
- A. Yes. I cannot say as to both, but with one of the two.
- Q. Well, did you state to them that you had a conditional bill of sale on that property?
  - A. Yes.
  - Q. Which one did you tell that to?
  - A. My idea is that it was Mr. Cooke.
  - Q. Where? Down here?
- A. Down in their office. Wait now, till I think whether it was their office. I have a picture of the office in my mind very well—across from the bank and a little further down the street.
  - Q. You mean, that is, in Oregon City?
  - A. In Oregon City, yes, certainly.
- Q. You think you had the conversation with Cooke?
  - A. Yes, I think it was Cooke. •
  - Q. Did you ever tell Moffitt that?
- A. I am not at all sure that Moffitt was not there, but my recollection is that only one was there.
  - Q. Did you exhibit any conditional sale?

- A. No, I don't think so.
- Q. As a matter of fact you never had one?
- A. We only had the agreement with them referred to.
- Q. You never had an executed conditional bill of sale?
  - A. No, we couldn't get it.
- Q. There was one prepared, and they refused to sign it?
- A. They refused to sign it, or neglected to sign it. I don't know whether they refused to sign it.
  - Q. They didn't sign it?
  - A. They didn't sign it, as far as I know.

#### RE-DIRECT EXAMINATION.

- Q. In connection with this Exhibit 2, did you receive this letter from Mr. Bohn, and send that letter back to him?
- A. There is no signature on this, so I will have to read it. I see no signature at all. This is my writing on the back of it here. Yes, I remember those letters. That is, I hadn't seen them before, but that is substantially what I testified to. I recall now that that was the letter with which I transmitted the agreement which I signed, Defendant's Exhibit No. 2.

Mr. JONES: I offer this letter from Mr. Geo. W. Bohn to Ira Bronson, dated February 8, 1910, and a letter to Mr. George W. Bohn, dated November 13, 1909, as Plaintiff's Exhibit "B."

Mr. GEARIN: You remember that as a copy of the letter you sent?

A. Yes, I remember it very distinctly. I hadn't seen it—it hadn't been brought to my attention for several years, since it was written.

Mr. Jones read the letter from Mr. Bronson to Mr. Bohn, a part of Plaintiff's Exhibi "B," as follows:

"November 13, 1909.

Mr. George W. Bohn, Seattle, Washington.

Dear Sir:

I have signed for the Pacific Machinery Company the proposed reorganization agreement as prepared by the Oregon City Lumber and Manufacturing Company, a copy of which is herewith enclosed. I desire to couple with the signature the following, to-wit:

First, That the signing of this agreement presupposes the signing of the same by substantially all of the unsecured creditors of the Oregon City Lumber and Manufacturing Company.

Second, That the stock to be issued shall be issued to all the creditors alike and upon the par value of and bona fide indebtedness against the company and that no more stock shall be issued than is sufficient to take up such indebtedness.

Third, Upon the condition that such arrangements will be made as shall practically assure the company a new lease of life for at least one year,

including the necessary funds to finance itself in the meantime.

Mr. Green and myself have assured ourselves of the wisdom of this arrangement after a long conference with you and are basing it very largely upon the hope that the other creditors will see fit to place the control of this proposition very largely in your hands. So as not to embarrass you I may suggest that this suggestion is made by ourselves of our own initiatives. In any event we are willing to leave it in that sense. If any other disposition is made of the management we should consider it only fair to ourselves to be consulted with reference thereto.

I may say in this last connection that our position with reference to our being entitled to a lien upon the machinery which we put in the mill is based upon the theory that the refusal of the mill company to give us a machinery contract such as we could file under the registry law will not be held by the courts to deprive us of the security which we would undoubtedly have lost had we failed to file such conditional sale through our own laches. We do not think that at the present time there is any necessity for starting into litigation over this question and we are perfectly content to give the concern every opportunity to get on its feet by an extension.

It is understood that our agreement involves our claim as originally proposed by ourselves subject to

the offsets absolutely agreed upon upon a conference with Mr. Bohn and Mr. Collins in Portland, approximately \$5724.86.

Very truly,

IB/R PACIFIC MACHINERY COMPANY."

The other letter forming a part of "Plaintiff's Ex. B," reads as follows:

"Feb'y 8, 1910.

Ira Bronson, Atty.,

Seattle, Wash.

Dear Sir:

Replying to yours of the 4th inst.

We expect to have the receivers discharged within the next few days, and will also make up a new inventory and send you copy.

The concern will be in the hands of the preferred stock—which stock must first receive its dividends and be entirely retired before the old stockholders (common stock) receive anything.

If the present plans are carried out, prospect for the concern is favorable, it is the only mill in Oregon City, and with the present higher market for lumber, it ought to work out.

Truly yours,

GEO. W. BOHN."

Witness excused.

William G. Bohn, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

# Questions by Mr. Gearin:

Mr. Bohn, what is your business now?

- A. Why, I am not in any business at present.
- Q. During the year 1909 what was your business?
  - A. I was in the lumber business.
  - Q. Where?
  - A. In Portland and Oregon City.
- Q. You are familiar with a corporation known as the Oregon City Lumber and Manufacturing Company, were you?
  - A. I am.
- Q. What relation did you bear to that corporation?
- A. I was the principal stockholder and president of the concern.
  - Q. You were president of it?
  - A. Yes.
- Q. What property did that concern own at that time?
- A. It owned the building and the machinery in the sawmill and planing mill and sash and door factory at Oregon City.
- Q. Now, you may state to the Court if, during the month of April, 1909, you as president of the company had any dealings with the Pacific Ma-

chinery Company with reference to the personal property and machinery described in the complaint in this suit.

- A. I did.
- Q. You represented your Oregon City Lumber Company, and who represented the Machinery Company?
  - A. Mr. Garrett.
- Q. I will ask you to look at the paper marked "Plaintiff's Exhibit A," and introduced by Mr. Garrett, and state to the Court if that is your signature, and if you and Mr. Collins signed it.
  - A. Yes, sir, we did.
- Q. Is the date about right? Do you think that is when it was done?
- A. April 29, 1909. Yes, sir, that was the date it was done.
- Q. There is attached to the paper what is denominated "Specifications of Sawmill Machinery for Oregon City Lumber and Manufacturing Company," etc.?
  - A. Yes, sir.
- Q. I will ask you to examine them, and state if you know who prepared them?
- A. Why, my recollection is that this was prepared by the Pacific Machinery Company; that we furnished the plans of the mill as prepared by our millwright, and this list was prepared by the Machinery Company.

- Q. Now, you were remodeling the mill, were you?
- A. Why, yes, we were installing the machinery which we had taken out of another sawmill, and adding this to it to make a complete modern mill.
- Q. And your millwright suggested to you, I suppose, the things that you wanted, and took it up with the Pacific Machinery Company, and they among them agreed upon this specification; is that it?
- A. The millwright prepared a plan and specifications of what we wanted in the way of machinery, and that was submitted to various machinery houses for figures, and among the rest of them the Pacific Machinery Company, and this was their reply to it.
- Q. You submitted that to other machinery houses?
  - A. Yes, sir, we did.
- Q. And they bid lower than anybody else, did they?
  - A. Why, I presume they did.
- Q. Well, with reference to the signing of this paper here, when did you send out the specifications to be figured on by the other people who bid on it?
  - A. Oh, it was previous to April 29th.
  - Q. You couldn't state how long before that?
- A. Oh, it may have been thirty days before that. It took us some time to get the thing all worked out—to get the figures together.

- Q. And in answer to your proposal, they sent you this letter?
  - A. No.
  - Q. Well, what then?
- A. They submitted their figures to us, and then we either sent for them or we called on them—I don't remember which—and negotiated with them for the machinery.
- Q. Well, that was the time, then, this letter was drawn up?
  - A. Yes.
  - Q. And signed and approved by you?
  - A. Yes, sir.
- Q. Did they exhibit to you at that time any conditional sales-contract to be signed by you?
  - A. No.
- Q. Did they have there any notes to be executed by you?
  - A. No, sir.
- Q. State what they did with reference to furnishing this machinery, how soon they began to do it, and whether or not they furnished it in accordance with your understanding of the agreement?
- A. Why, they were to begin furnishing it at once and continue to furnish it until it was all in there.
  - Q. What did they do about it?
- A. Well, they were very dilatory about getting the machinery in there. Then they wrote us at different times and wanted to make changes in the

machinery, claiming that, by making those changes. it would facilitate the shipments. And we consented to making the changes. They wanted to change, as I remember it, a hog from one kind of a hog to another. Then there was a steam feed, they wanted to change that from one to another; and then there was a large beveled gear, they wanted to change that to another—beveled gear is nearly the main connecting link in the mill—and we consented to that. And by making these various changes, and our consenting to the things, we finally got most of the machinery in there, and got it set up; but it was spread out over a long period, several months. before we got it.

- Q. Did it run up to October?
- A. I don't know whether it did or not.
- Q. Now, at the time of the signing of this paper, Mr. Bohn, did you pay any money?
  - A. I think I gave them a check for \$100.
  - \$100? 0.
  - A. Yes, sir.
- Q. Did they make any demand at any time during the summer for more money?
  - A. Yes, sir, they did.
  - What was done about that? 0.
  - There wasn't anything done about it. 1.
  - You didn't pay them any more? 0.
  - A. No. sir.
  - Q. How often did they ask you for money?

- A. Why, after the first demand I guess they made repeated requests for money.
- Q. Now, I want you to tell the Court when you first saw any paper purporting to be a conditional bill of sale of this stuff.
- A. I have some papers in my pocket that I can refer to.
- Q. All right, I wish you would do it, and tell the Court about it, when they first showed you that.
- A. On July 22, 1909, is the date of this statement; but it was evidently several days after that before it was presented to us. I don't think it was presented on that day. They sent us a statement for various shipments made, for instance, contract \$4695, and some extras \$1115, to difference on a trimmer \$350, and something else \$168.54; making in all \$6328.54; and on the bottom here is a notation saying that "On May 5th/09 we received \$100. Deduct this amount from \$2035.54 that is due upon execution of this contract. In other words, get a check for \$1935.54 and the notes signed, also contract."
  - Q. Where did you see that first?
- A. Why, it was presented to me by somebody in connection with the Machinery Company, I presume.
  - Q. It was by someone representing them?
  - A. Yes, sir.

Mr. GEARIN: We offer that in evidence.

Marked "Defendant's Exhibit 3."

- Q. Now, after receiving that, what did you next receive?
- A. Why, along with that, we received this contract.
- Q. The same party that brought one brought the other, did they?
- A. They must have both come together. This one is dated, however, one day later than that. This is dated the 23rd day of July. That was dated the 22nd, I believe.
- Q. Now, Mr. Bohn, who brought you that paper, or how did you get it—the one you now hold in your hand?
- A. Why, I am not certain, but I think that Mr. Garrett must have given it to us.
  - Q. This one that is in court?
  - A. Yes, sir, I think so.
  - Q. Or the other one?
  - A. No, this one here. I never saw the other one.
  - Q. Thomas Garrett?
- A. I don't believe I ever saw the other Garrett; don't know him.
- Q. You think Mr. Thomas Garrett? Somebody gave it to you, anyway?
  - A. Yes, sir.
  - Q. That was what date?
  - A. This is July 23rd.
- Q. 1909. Up to that time had anybody ever said anything at all to you about a conditional bill of sale?

- A. No.
- Q. Did you agree to take a conditional bill of sale?
  - A. No, sir.
- Q. When this was presented to you, what did you say about it?
- A. Why, I just simply refused to execute it. That is all.
  - Q. You told him that was not the contract?
  - A. I didn't execute it. We didn't execute it.
  - Q. And then what happened about it?
- A. Why, the next thing I know, Mr. Bronson here, I think, called on us and asked for a settlement of the account.
  - Q. When was that?
- A. Oh, that was long after this. I don't know how long. But it was some time after that, anyway.
- Q. Do you remember when the concern went into insolvency, when there was an assignment?
- A. No, I don't know those dates. I haven't them in my mind. I objected to the payment of this account, because I thought we were entitled to a discount for delay in shipping, along with changes and other things.
- Q. Well, you say you objected to the payment of the account?
  - A. Yes, sir.
- Q. You considered, then, that you had made a contract whereby you owed this money if they had complied with their contract?

Mr. JONES: If your Honor please, I object to that.

Mr. GEARIN: I guess that is leading. This statement requires an explanation.

- Q. What do you mean when you say you thought you were entitled to a rebate?
  - A. Will you repeat that?
- Q. What do you mean when you say that you thought you were entitled to a rebate on that account?
- A. Why, they delayed us in the shipment of that machinery, we thought, beyond all reason, and it was just at a critical time in the organization and starting of that business, and not getting this machinery embarrassed it very much at that time, and we thought we were entitled to a discount in their bill, and made a demand on them for a discount.
- Q. That is, for a discount on the amount which you understood was owing?
  - A. Yes, sir.
- Q. Now, I will ask you again, Mr. Bohn, did you at that time or at any time ever agree with these people to take a conditional bill of sale for that property?
  - A. I did not.
  - Q. You understood it to be an absolute sale?
  - A. Yes, sir.

#### CROSS-EXAMINATION.

Questions by Mr. Jones:

You agreed to the changes that were made in those specifications did you, consented to them?

- A. I think we did.
- Q. You received the stuff when it was shipped, did you?
- A. Yes. What stuff was shipped was down there.
- Q. Well, it was all shipped, wasn't it, subject to the changes made?
- A. Well, I don't hardly think it was all shipped, but most of it was shipped.
- Q. You are not now claiming any specific items that were not shipped, are you?
  - A. No.
- Q. The reason you would not make any payment was because you claimed something for delay?
  - A. Yes, sir.
  - Q. How much do you claim for delay?
  - A. I think we asked \$3000 at that time.
  - Q. On a \$5700 shipment?
  - A. Yes, sir.
- Q. And yet the assignees agreed, did they not, that the claim of the Puget Sound Machinery people, the balance owing it, was \$5700 and some odd dollars?
- A. I don't know. I hadn't anything to do with that.

- Q. Do you mean to say that you understood that this was an out and out sale?
  - A. Yes, sir.
- Q. And yet you signed this contract, Exhibit "A," which says that this stuff was to be covered by machinery contract?
  - A. That is my signature there, yes, sir.
  - Q. During this year your company was in failing circumstances, wasn't it?
    - A. What time.
  - Q. Well, between the time of signing this contract and during the time of the delivery of the goods, but running up through the summer.
    - A. Well, it was along late in the summer.
  - Q. Did you have the money on hand with which to make these payments of the amount that was owing?
  - A. Why, I don't know whether we did or not. We probably were in a position to get it.
- Q. Well, wasn't one of the reasons why you didn't make the payments because you didn't have the money?
  - A. No.
- Q. Do you mean to say that you were able to pay at any time you wanted to during that time?
- A. There wasn't any question about that. The question was to make a settlement.
- Q. Well, but I am asking you whether you were able to pay?

- A. I think at times we could have paid there without any difficulty.
- Q. Did you ever offer to pay what was due after taking off what you claimed for delay?
- A. I don't think so. We offered to make a settlement, but I forget just what the conditions were.
- Q. Now, was there any delay in the arrival of the first machinery?
- A. My recollection is, what we wanted first came last, and what we wanted last came first, and the think was all reversed. We were unable to go on.
  - Q. Did you specify here what you wanted first?
- A. Why, anybody that is in the business and is familiar with mill machinery knows what a man wants to start his work.
- Q. Well, but did you specify in your contract what you wanted first?
- A. It was talked over. He was supposed to know. It is like building a house—you cannot put the roof on first.
- Q. You say you think that the Pacific Machinery Company made up those specifications?
  - A. I do.
  - Q. But you are not sure of that?
  - A. Well, I am pretty sure of it.
  - Q. What makes you so sure?
- A. Because we had a millwright, and he prepared the plan, and the plans were submitted to the different machinery companies, and they prepared their bids and sent them in. I have a copy of the

specifications in my pocket that were submitted by the machinery company.

- Q. By which—the other machinery company?
- A. The Pacific Machinery Company.
- Q. Let me see them, will you?

(Witness produces paper.)

A. This is marked here "Specifications of Sawmill Machinery for the Oregon City Lumber & Mfg. Co. from Pacific Machinery Co., 49 First Street, Portland, Oregon."

Mr. GEARIN: Is this one you have just taken from your pocket?

- A. Yes, sir.
- Q. But your millwright designated the items here that formed these specifications, did he?
- A. He designated them by having a plan showing what was necessary for the construction of that mill. I don't think he made a list of it. I think he just furnished them with a plan.
- Q. May I see your copy of it. Does that contain a copy of the letter of the agreement, too?
- A. No, sir? There is something here that I might explain, that might help a little.
- Q. You had a good many conversations with Mr. Garrett, did you, before this letter here was signed—Exhibit A?
  - A. Oh, I had talked with him, yes.
- Q. When your millwright presented these plans from which these specifications were made, it was

understood, was it, that there would subsequently be other orders and specifications to be filled?

- A. No. I was considerably disappointed in this specification and in the lists, and the way the thing finally worked out.
  - Q. Well, but that doesn't answer my question.
  - A. Yes, it does.
- Q. I asked if, at the time this was signed, you had in mind that there would be other specifications of more machinery to be furnished?
- A. The only thing that I expected to have in addition to this list was a lot of pulleys that we might require, and some flanges to make pulleys. I didn't think there was a whole lot of other stuff that was coming in. I supposed these specifications covered it all.
- Q. Wouldn't you have been able to tell from this? You know just what you were getting from this, didn't you?
- A. No, I didn't. Now, for instance, right here is one item in these specifications which says "Blue prints of working drawings of this machine will be furnished to assist in the installation." That evidently comes from the machinery house. We wouldn't have any occasion to write anything like that in a list.
- Q. What reason did you give, Mr. Bohn, when that conditional sale contract was presented to you for not signing it, do you know?
  - A. I just simply repudiated the whole thing. It

wasn't according to my understanding of the trade and transaction.

- Q. You had the machinery then, most of it, didn't you?
- A. Why, they were shipping it. I don't think it was all delivered at that time.
- Q. And there was then some payment due on it—\$1500 or \$2000 payment—wasn't there?
- A. Well, according to that agreement there, I presume there was \$1500 that was coming to them when the machinery was delivered.
  - Q. And the notes were then to be signed?
  - A. When the stuff was delivered.
- Q. And it was to covered by a machinery contract?
  - A. No.
  - Q. That is what it says here, isn't it?
- A. No. Well, it says "machinery contract," the contract to be signed. No conditional contract.
- Q. Where is that instrument you had here awhile ago, that you said was presented to you?

Mr. GEARIN: Which was that?

Mr. JONES: That he was asked to sign.

Q. It was the machinery contract, or the form of machinery contract referred to, wasn't it?

A. Not according to my understanding.

The two agreements about which the witnesses had been testifying were thereupon received in evidence and marked respectively "Defendant's Ex. 4" and "Defendant's Ex. 5."

- A. The amount specified in this one, however, is \$3880.
  - Q. Where is that?
  - A. Down at the bottom there.
  - Q. Who put those figures on there, do you know?
  - A. That was there when we got it.
  - Q. Do you know who put them there?
  - A. I suppose Mr. Garrett did.
  - Q. Do you know who put them on?
  - A. I don't know.
- Q. Mr. Bohn, when your blue-prints were drawn up for your changes, you specified different parts of the mill by section numbers, didn't you?
  - A. Why, I presume they did.
- Q. And those section numbers started in and ran from one up to as many sections as you were going to have?
  - A. I presume that was given.
- Q. Now, the contract or the specifications that have been introduced as Plaintiff's Exhibit "A" cover section numbers 29, 26, 28, 9, 6, 36, 40, 18 and 37. Now, all of the others that are omitted, the numbers would be other sections in the mill, wouldn't they?
- A. Well, not necessarily. I don't know as they would be numbered consecutively. They might be, and they might not.
- Q. Well, do you mean to say that those constitute all of the sections that were to be supplied, then?

- A. Why, that was my understanding of it. You see we had a lot of machinery ourselves and we were just filling in with this machinery.
- Q. If there were subsequently other sections ordered from the Puget Sound Machinery Depot, and given different section numbers from these, then your understanding would be incorrect, would it?
- A. Well, it might have been additions or some changes made. They may have been designated as sections.

## EXAMINATION BY THE COURT.

- Q. Mr. Bohn, when you signed that original contract or letter there, it purports to be a letter containing the words "Transaction to be covered by machinery contract." Did you understand that that condition was in there when you signed the letter?
  - A. You mean the "machinery contract"?
  - Q. Yes.
  - A. The letter was complete there as we signed it.
- Q. You understand, of course, that that condition was in the contract there?
  - A. Not a conditional sale, no, sir.
- Q. Well, what did you understand a machinery contract was?
- A. Why, I supposed it was the machinery—that they were going to make a contract based on their proposition to furnish that machinery.
  - Q. But not a contract with conditional terms?

- A. No, sir, I didn't have any idea of that kind at all.
- Q. Was there any form of contract produced for your inspection at that time?
  - A. No, sir, there was not.
- Q. They didn't tell you what their form of contract was?
  - A. No, sir.
- Q. Did you know anything about their forms of contract that they use generally?
  - A. I did not. I did not, no, sir.
- Q. (Cross.) Didn't Mr. Garrett tell you that they would furnish this only with reservation of title in themselves?

A. No.

#### RE-DIRECT EXAMINATION.

- Q. Now, Mr. Bohn, did you afterwards sign a guarantee, at their request, you and Mr. Collins?
- A. My recollection is that we did, and that Mr. Collins and I signed a letter to the Pacific Machinery Company, guaranteeing the payment of this machinery.

COURT: Was that a personal guaranty?

- A. Personal guaranty.
- Q. How long after this first transaction?
- A. Why, it was at or about the time that the contract was—
- Q. With reference to the time this \$100 was paid?

- A. At the same time.
- Q. You paid \$100?
- A. Yes, sir.
- Q. And then signed a guaranty?
- A. Yes, sir.

Mr. GEARIN: Have you that?

Mr. JONES: No, we haven't any knowledge. Mr. Garrett, have you knowledge of such a guaranty?

Mr. GARRETT: I think the one he refers to is the one right here.

Mr. GEARIN: Anyway, you say you haven't got it?

Mr. JONES: We haven't anything but this here.

- Q. Your remembrance is you signed one, Mr. Bohn?
  - A. I do, yes.
- Q. Were you at that time responsible financially, you and Mr. Collins?
  - A. Yes, sir, I was.
- Q. What is the condition of that machinery now up there, with reference to being a part of the building?
- A. It is part of the plant. It is in there, fastened to the other machinery, and all the machinery together makes the sawmill.
- Q. And every bit of it is fastened somewhere to the walls, a part of the building?
  - A. Surely. It is fastened to the foundations,

and it is fastened to the wooden part, and other pieces on top of it, and one machine is fastened up to another, and it is all put in together, the way a sawmill would be constructed.

- Q. And it was put in that way as fast you got it, was it?
  - A. As fast as we could get hold of it, yes, sir.

Mr. GEARIN: I now offer in evidence memo. of account of June 10, 1909, June 15, 1909, June 24, 1909, June 24, 1909, June 25, 1909, July 2, 1909, July 13, 1909, July 17, 1909, July 22, 1909, July 29, 1909, August 6, 1909, August 31, 1909, and September 9, 1909.

- Q. I will ask you, Mr. Bohn, if you received those papers? You handed them to me.
  - A. Yes, sir.
  - Q. Did you get them in due course of mail?
  - A. Yes, sir.
- Q. They are statements of account from the Pacific Machinery Company to the Lumber Company?
  - A. Invoices for material shipped.
- Q. Invoices. Did the stuff come in accordance with those invoices?
  - A. I presume it did.

The said invoices were thereupon received in evidence and marked "Defendant's Exhibit 6."

Mr. GEARIN: I now offer in evidence letters of Pacific Machinery Company, May 13, 1909; May 19, 1909; June 4, 1909; July 20, 1909; July 22, 1909;

and January 8, 1910, all signed Pacific Machinery Company, by Thomas Garrett, Manager, and all with reference to this property as it was being furnished. They are all on the letterheads of Pacific Machinery Company.

- Q. You may state, Mr. Bohn, if those letters that I have called attention to were received by you in course of mail.
  - A. Yes, sir.
  - Q. These letters you handed to me?
  - A. Yes, sir.

Said letters were received in evidence, marked "Defendant's Exhibit 7," and read as follows:

"Portland, Oregon, May 13, 1909.

Oregon City Lumber & Mfg. Co.,

. Oregon City, Oregon.

## Gentlemen:

In accordance with our telephonic conversation with your Mr. Bohn would say that trimmer which we are furnishing you will handle saws only as large as 24" diameter and we understand from your Mr. Bohn that this will be satisfactory, and we are having trimmer come forward accordingly.

Trusting that this is agreeable, we remain,

Yours truly,
PACIFIC MACHINERY COMPANY.

Thomas Garrett, Mgr."

"Portland, Oregon, May 19, 1909.

Oregon City Lumber & Mfg. Company,

Oregon City, Oregon.

#### Gentlemen:

Inclosed please find blue-print of drawing showing setting plan of 42" tightener frame for Beck's Patent Feed Engine.

Trusting this will be of assistance to you, we remain,

# Yours truly, PACIFIC MACHINERY COMPANY, Thomas Garrett, Mgr."

"Portland, Ore., June 4th, 1909.

Oregon City Lumber & Mfg. Co.,

Oregon City, Ore.

#### Gentlemen:

On the 2nd we made shipment to you at Oregon City, by the O. C. T. Co., of 500 ft. of No. 104 & C chain; 300 ft. of No. 74 chain; 90 ft. of No. 78 chain; (13) 30 1 15/16 flat boxes, babbitted; 2 2 7/16 flat boxes, babbitted; and one 1 1 15/16 eccentric box.

This forenoon we are delivering to the O. C. T. Co. 13 2 7/16 flat boxes, babbitted; 2 2 15/16 flat boxes, babbitted; 4 2 3/16 flat boxes, babbitted; 4 3 15/16 flat boxes, babbitted; and 2 2 7/16 eccentric boxes; also 15 1 15/16 set collars; 14 2 7/16 set collars; 4 2 15/16 set collars; 14 2 7/16 set collars; 4 2 15/16 set collars; 2 2 3/16 set collars and 3 3 15/16 set collars; also 200 ft. No. 78 riveted

chain, 600 ft. No. 74 riveted chain, 25 ft. No. 82 riveted chain and 300 ft. No. 74 & n riveted chain, with rivets for same.

Trusting that this will be delivered to you promptly, we remain,

Yours very truly,

2 7/16 PACIFIC MACHINERY CO.

5 short want 9 got 4.

Thomas Garrett.

Exchange—30' of No. 73

instead of No. 78—40 ft. 124 short— 90′ 104—Sect. 37."

"Portland, Ore., July 20, 1909.

Oregon City Lbr. & Mfg. Co.,

Oregon City, Ore.

#### Gentlemen:

With reference to the two No. 82 Sprocket Wheels furnished you by ourselves and which your Mr. Keller advised were defective, would say that the order sheet on which these sprockets were entered has in some way been mislaid, so we beg to ask that you kindly give us a memorandum of the size of the sprockets and the sections in which they were included.

Yours very truly,
PACIFIC MACHINERY CO.,
Thomas Garrett, Mgr."

"49 First St., Portland, Jan. 8th, 1910.

Oregon City Lbr. & Mfg. Co.,

Oregon City, Ore.

Gentlemen:

We wrote you under date of Septr. 1st, requesting that you return the two defective sprockets to Seattle, as we had replaced them with other sprockets. You returned to us here the 12 tooth No. 87 sprocket at the time you shipped us the boxes, but we have never received the 29 tooth No. 82 sprocket. Kindly forward this sprocket to the Puget Sound Machinery Depot, Seatle, Wn., advising us at the time shipment is made, and oblige.

Yours truly,
PACIFIC MACHINERY COMPANY,
Thos. Garrett, Mgr."

## RE-CROSS EXAMINATION.

- Q. Mr. Bohn, you don't seem very positive in your recollection of a number of these things. Are you quite sure you signed an entirely independent guaranty, aside from this one that has been introduced here?
  - A. That is my recollection.
- Q. Well, was it on the letter-head of the Puget Sound Machinery Depot?
- A. I wouldn't be certain about that, but I think it was. I think it was a letter prepared by them, and we signed it.
  - Q. Whom was it delivered to?

- A. Delivered to the Pacific Machinery Company.
- Q. Who represented it?
- A. The only man I ever had any transaction with was Mr. Garrett.
  - Q. Delivered to Mr. Thomas Garrett?
  - A. Yes.
  - Q. Where was it delivered?
  - A. At their place of business.
  - Q. At their place of business here in the city?
  - A. Yes, down on Front Street or First Street.
  - Q. When was it delivered?
- A. About the time that we were negotiating for this machinery.
  - Q. Well, before or after?
  - A. It was after.
  - Q. Before or after April 29th?
  - A. It was after the order was placed.
- Q. Why should you sign a guaranty when you had agreed in that contract to indorse their notes?
- A. Because he asked me to sign the guaranty, and we signed it.
  - Q. Was it a typewritten guaranty?
  - A. Yes, sir.
  - Q. Did you keep a copy of it?
  - A. I did have a copy of it.
  - Q. Can you produce the copy?
  - A. I cannot.
  - COURT: Whom was that signed by—yourself?
  - A. Signed by Mr. Collins and myself.

Excused.

Defendant then offered in evidence the trust deed from the Oregon City Lumber & Manufacturing Co. to John J. Cooke and J. W. Moffitt and the same was received and marked "Defendant's Exhibit 8." It was stipulated by counsel that the trustees executed to defendant Meyer a transfer of whatever interest they had in the property in question.

Thomas S. Garrett, recalled for the plaintiff.

#### DIRECT EXAMINATION.

## Questions by Mr. Jones:

Mr. Garrett, did you present to Mr. Bohn, the gentleman who just testified, a guaranty of this account for his signature, apart from this contract?

- A. Not apart from it.
- Q. This is the only thing you had him sign?
- A. Yes.
- Q. This Exhibit "A"?
- A. Yes.

### CROSS-EXAMINATION.

### Questions by Mr. Gearin:

. Do you recall anything about a guaranty signed by him and Collins?

- A. Oh, yes. This is the one that we have here.
- Q. Outside of that, Mr. Garrett?
- A. No, not outside of that.
- Q. Well, would it be likely to be done with your brother or some other officer of the company?

(Testimony of Thomas S. Garrett.)

- A. It would not be likely, because we already had all that such a guaranty could cover.
  - Q. Well, Mr. Bohn testifies to having paid \$100.
  - A. Yes.
  - Q. Did he pay that to you?
- A. Well, I don't know whether he mailed his check in, or whether I went out and got it, or whether I got it.

Mr. JONES: We will admit there was a payment of \$100.

- Q. At the time of the payment of \$100, Mr. Garrett, he says he also signed this guaranty. Now, if you don't remember the payment of the \$100, isn't it quite likely that the other transaction took place with somebody else, too?
- A. You ask if it is likely. It is not likely, because no one would want to duplicate a thing like that. We had already got all they had to offer in the way of personal guaranty, so it is not likely we would ask them to do it again.
  - Q. Anyway you don't recall it?
- A. I don't know of any such other claim myself, I am sure.

Mr. GEARIN: All right. That is all. Excused.

Edward I. Garrett, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

### Question by Mr. Bronson:

What is your business, Mr. Garrett?

- A. I am in the machinery business.
- Q. How long have you been engaged in that business, up in the northwest here?
  - A. More than 21 years.
- Q. You were connected with the Pacific Machinery Company at the time when the sale was made to the Oregon City Lumber & Manufacturing Company, which is the subject matter of this case?
  - A. Yes.
- Q. Are you familiar, Mr. Garrett, with the method of sale of machinery which is sold to saw-mills, lumber mills, on time?
  - A. Yes.
- Q. Are you familiar with the use of the phrase, "machinery contract"?
  - A. Yes.
- Q. What is the significance of that phrase as used in the trade?
  - A. It is always used by us, and has been.
  - Q. But generally speaking?
- A. It is a general term that is commonly used in the sale of machinery, whereby the vendor intends to retain title until the machinery is paid for.
- Q. How does it compare with the phrase "conditional sale"?
  - A. Synonymous.

- Q. You say it is synonymous with that term?
- A. Yes.
- Q. Mr. Garrett, were you down at Oregon City at the time when a sale was advertised to be made of the machinery which had been, among others, sold by the Pacific Machinery Company to the Oregon City Lumber & Manufacturing Company, by the assignees?
- A. Yes, I came from Southern California especially for that purpose.
  - Q. With whom were you there?
  - A. With you.
- Q. Did you have any conversation with the bank officers—Mr. Meyer and Mr. Latourette?
  - A. We did. You and I were in there together.
- Q. Can you state whether or not, as the result of that conversation—or was there more than one conversation?
- A. It is my impression that we were there a second time later, after the sale, at another date.
- Q. What time did you go down there during the day?
- A. We were there in the forenoon of the day of the sale.
  - Q. Early in the forenoon?
  - A. Yes, and there after lunch also.
- Q. Did we have a conversation with the people in the bank and with the assignees, or one of them?
- A. We had a conversation with the people in the bank, and with at least one of the assignees, and I

cannot say whether it was Mr. Moffitt or Mr. Cooke. I know we made a particular point of looking them up, and went to his office.

- Q. And can you give very briefly the substance of the conversations that were had, so far as they might include a discussion of what rights you had or interests you had, or anything of that kind?
- A. We went to Oregon City on that day, not to bid on the machinery, but to notify the assignee and whoever might buy it in that we had a claim on the machinery, that we claimed title to it until it was paid for, under our contract with the purchaser.
- Q. Did you have any further object in attempting to negotiate with them about it?
- A. Either at that time or later, we tried to arrange with Mr. Latourette to let us handle the sale of the entire mill property, believing that we were in closer touch with prospective mill purchasers, and that we could handle it to our mutual advantage, taking into consideration our claim on the part of the stock we furnished.
- Q. I don't want to ask you a leading question, but what did you say to them in substance, Mr. Garrett? I cannot expect you to recall the words at this late day. What did you say to them in substance, as to what your relation to this machinery was?
  - A. You mean prior to the sale?
  - Q. Yes, prior to the sale.
  - A. That we had sold the machinery to the people

who owned the mill at the time of the sale, with the understadning that we were to retain title to it until it was paid for under this machinery contract, and that they had failed to carry out that part of signing the necessary contract upon the delivery of the machinery as it is customary to do, and that we still claimed right because of our original contract with them.

- Q. What did they say about the propositions that were made to them, Mr. Garrett?
- A. I don't remember what the assignees said at all. Mr. Latourette said that he didn't consider we had any claim. In fact, we couldn't get much satisfaction—much of a conversation with Mr. Latourette at the time.
- Q. Are you familiar with the mechanical end of sawmills, machinery, etc.?
  - A. Yes, I am.
- Q. Was any of this machinery, Mr. Garrett, so attached to this mill as to render it at all difficult to remove it?
- A. None at all. All of it can be removed by simply taking off the nuts, and the bolts that attach it to the wood work.
- Q. Would that in any way tend to injure the mill or the machinery?
- A. Not at all. It would not injure the mill building or the framework of the mill at all.
- Q. Would it necessitates taking down any of the mill building?

- A. Not at all. We frequently do that. We are constantly removing machinery from mills under like conditions, without injury to the realty or any part of it.
- Q. Are you familiar, Mr. Garrett—you are familiar with the value of the machinery, etc.?
  - A. I am.
- Q. Are you familiar with the fair rate of depreciation on machinery?
  - A. I am.
- Q. Do you know how long this machinery had been in this mill, approximately?
  - A. You mean at the time of the sale?
  - Q. Yes.
- A. It had been in there about twenty months—from twenty to twenty-two months.
- Q. Do you know what, as regards the market value of machinery, would be a fair rate of depreciation upon its considering how it had been used? Do you know, by the way, whether it had been extensively used?
- A. I had been informed that the machinery was used little, if any.
  - Q. Did you look it over?
- A. As a matter of fact, I think the mill began operation not before August. I think it went into the hands of the assignees some time in October. So even if it had run all that time, the operation would have been very little.
  - Q. With the knowlege of those facts, can you

state what would be a fair rate of depreciation as against its original value?

A. Most of the stuff could have been sold as new, with cleaning up and painting. I should think fifteen or twenty per cent depreciation would cover it fully. It would not have deteriorated that much in usefulness, but the salability of some of it would have been reduced probably that much, from a merchandising point of view.

#### CROSS-EXAMINATION.

Questions by Mr. Gearin:

Mr. Garrett, you have narrated now all the conversation that you had with those people?

A. Mr. Gearin, I don't know that I have related all of it. I have related all that I remember.

Q. It was substantially just as you have stated it?

A. I think so.

Q. 'Had you ever up to that time had any conversation with Mr. Latourette or Mr. Meyer or those assignees, or any of them?

A. Personally, none. I had been in California for several months.

Q. Do you know about what time it was you had that conversation?

Mr. BRONSON: You mean the time of the day?

Mr. GEARIN: No. The time of the year or month. What year was it?

A. It was in the spring of 1911. I came back

from California in April, for the purpose of being present at the time of the sale.

- Q. It was in the spring of 1911?
- A. Yes, sir.
- Q. At the time, at all events, that this sale took place?
  - A. Yes.
- Q. And your original transaction with the Lumber Company was in 1909, wasn't it?
  - A. Yes, sir.
- Q. You had been advised that there was a failure up there, and an assignment for the benefit of creditors?
  - A. Yes.
- Q. And that there was a proceeding by the assignees to transfer such title as they might have? You understood all that?
  - A. Yes.
  - Q. That is what brought you up?
  - A. Yes, sir.
- Q. Now, Mr. Garrett, there never was any conditional sales contract signed, was there?
- A. Nothing more than the agreement entered into originally, at the time the sale was made.
  - Q. What do you mean by the agreement?
- A. It stipulated that—I would like to see the wording of that.
- Q. It is that offer you are talking about? This is what you are talking about, is it not? That is Exhibit "A"?

- A. The conditional sale feature, or the retention of title feature, was covered by our letter in which we say, "Transaction to be covered by machinery contract, with notes on deferred interest, bearing eight per cent."
  - Q. That is this Exhibit "A"?
  - A. Yes, sir.
- Q. Outside of that, there never was anything signed by the Lumber Company and your company, was there?
  - A. No, sir, I think not.
- Q. And this Exhibit "A" is your letter to the Oregon City Lumber & Manufacturing Company, in response to their notification that they were in the market for this and similar machinery?
  - A. Yes, sir, I think so.
- Q. You proposed by this letter to furnish them the stuff on the terms set out in here?
  - A. Yes.
- Q. And then Mr. Bohn came down. You know Mr. Bohn?
  - A. No, I don't. I never met him.
- Q. Did you have anything to do with the oral transactions, then?
  - A. No, not at all.
  - Q. Not a thing?
  - A. Not a thing.
- Q. This letter your wrote, and your transaction with it ceased so far as having any dealings with anybody is concerned?

- A. I don't think I wrote that at all.
- Q. Your brother signed this?
- A. Yes, he was manager of the Portland office.
- Q. You recognize it as the act of your company?
- A. Yes, I do.
- Q. I understand you to say you had no conversation at all with these people about it?
  - A. No, I had none at all.
- Q. Did you have until the time you went up to Oregon City, at the time of this assignee's sale?
  - A. I think not.
- Q. So that all you really do know about it, then, is what happened up there, and the conversation you had with them, and this offer?
- A. Well, I, of course, was in a general way conversant with conditions all the time.
- Q. Well, I know, but personally you didn't conduct any of these negotiations?
- A. Personally I had no direct negotiations with the people, up to the time we went to Oregon City.
- Q. Well, now, you are Mr. E. I. Garrett, are you?
  - A. Yes.
- Q. I will ask you if you didn't file a complaint in this court, before this suit was filed, which is sworn to by you?
- Mr. BRONSON: We will admit there was a case filed.
- Mr. GEARIN: I will simply offer these papers. There is no question about it, I think.

106

(Testimony of Edward I. Garrett.)

Mr. BRONSON: Not at all.

Mr. GEARIN: We offer the record in the suit of The Pacific Machinery Company v. Oregon City Lumber Company, et al., Judgment Roll 5205.

COURT: Very well; let it be admitted.

The same was received in evidence and marked Exhibit —.

Q. Which one of the Latourettes, if any one, did you talk to in Oregon City, do you know? Was it this gentleman here? There are two of them.

A. It was some years ago, Mr. Gearin. I am satisfied it is the gentleman with the beard.

O. This one over here?

A. Yes, although of course I saw him not more than twice. It is five or six years ago.

Q. This is Mr. Cooke on the corner, and this is Mr. Meyer between the two Latourettes. Which one of them did you talk to?

A. I saw them just once, probably not over fifteen or twenty minutes. I cannot say which one. I am prepared to say that I saw one of the two absolutely, and possibly both of them. But it was as you understand, five years ago, and only for a few minutes.

Witness excused.

Thereupon the plaintiff rested its case.

D. C. Latourette, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

## Questions by Mr. Gearin:

Mr. Latourette, you live in Oregon City?

- A. Yes, sir.
- Q. What is your business?
- A. I am a banker.
- Q. Were you engaged in that business in the spring of 1911?
  - A. Yes, sir.
- Q. Do you recall having seen Mr. Garrett in Oregon City about that time?
- A. Yes, I think I do, along about the time of the sale.
- Q. This gentleman that was on the stand. You recall the time that the property of the Lumber Company was sold by the receiver?
  - A. Yes, sir.
  - Q. Were you present at the sale?
  - A. Yes, sir.
  - Q. And Mr. Meyer bought it, did he?
  - A. Yes, sir.
  - Q. For the bank?
  - A. Yes.
- Q. Did you have any conversation at that time with Mr. Garrett, in regard to the property, and the sale, and the proceeding generally? If you did, state to the Court what it was.

A. I remember that Mr. Garrett came into my office on that day, the time the sale was to occur, and said they had come over to attend the sale. I think there was someone with him—I don't remember who it was; an attorney, I think, though, was along with him. And I think he inquired for C. D. Latourette. That is the gentleman that sits yonder, the one that had charge of that matter. But there was very little said between us in regard to the matter.

Q. Did he tell you in that conversation, Mr. Latourette, that the Pacific Machinery Company owned that property, and that the Lumber Company had only a conditional bill of sale of it?

A. To my best recollection, there was nothing said about that matter. I remember afterward, after the sale, and after—well, perhaps a week or ten days later, perhaps longer than that, C. D. Latourette had been to Portland, this city, to attend a conference between Mr. Garrett and some others, in regard to their taking over the property and paying five thousand dollars. When he came back from that sale, he said they had made some claim here that they were the owners of that property, and I remember I was very much surprised at any claim of that kind being made, because I didn't know until that time about any such claim.

Q. That was after the sale had been made to Mr. Meyer?

A. Yes, sir.

Q. About how long after?

A. Oh, at this distance it would be hard for me to remember the length of time. Probably a week or two—two weeks. It might have been a month.

Q. Up to that time, you had never heard of that claim?

A. No, to the best of my recollection, that was the first time.

Q. When you say "C. D." there, you mean C. D. Latourette?

A. C. D. Latourette, yes.

Q. And the whole property was sold together—land and building and machinery and all, was it?

A. No land. There was a lease. The building is on leased ground. The machinery is in a building that is on leased ground. I have tried to recall that conversation. Of course, it was five or six years ago, and a great many things have occurred between that and this. I have tried to recollect that something might have been said that would put us on notice of that fact, but I cannot recall anything that would put us on notice of the fact of their ownership.

Q. Your best recollection is now, then that you didn't know anything about it?

A. Yes, sir.

#### CROSS-EXAMINATION.

## Questions by Mr. Bronson:

Do you recall, Mr. Latourette, any of the cir-

cumstances of the conversations that were had there? I will put it to you another way.

- A. Yes, I can remember. I can remember Mr. Garrett's coming in, and inquiring about the sale, and I remember I told him that Mr. C. D. Latourette, I think, had charge of that matter; I was not paying very much attention to it.
- Q. Don't you recall, Mr. Latourette, that Mr. Garrett and I tried to induce you to make some arrangements with us at that time to let us handle the sale of the property? Don't you recall that. I don't mean to handle that sale. I mean to handle the disposition of the property to be sold.
- A. I think there was something said about that in my presence there. Perhaps C. D. was present.
- Q. Do you remember you turned us down very abruptly, don't you—you wouldn't consider it at all.
- A. No, I don't remember that. Maybe I did, but I don't remember that I turned you down abruptly.
- Q. It is a long while ago, and I am seeking to refresh your memory with certain facts. I thought perhaps I might accomplish that object.
- A. I know we wanted to get the money out of that property. I am very sure if you had wanted the property, you would have gotten it.
- Q. In that connection, don't you remember you said, "Very well, gentlemen. You can pay us off, if you want to, and take this property?"
  - A. I don't remember that conversation; but I

may have said it. Probably would have said it if you had offered to pay it off.

- Q. You of course would recall this probably, that we came down there claiming to have some status, some right to deal with you, some reason.
- A. You came down to attend the sale, I think I understood, that sale was coming off that morning?
  - Q. The sales were made by bids, weren't they?
  - A. Yes.
  - Q. We made no bid there?
- A. You made no bid, as far as I recollect. I think you talked about putting in a bid, but I don't recall that you put one in.
- Q. Don't you recall this conversation: That Mr. Garrett said to you, "We are in this business, Mr. Latourette. We are familiar with machinery. We can handle this machinery and get more out of it for both of us than you can."
  - A. No, I don't remember that.
- Q. Do you remember our saying that we would sell that machinery and would pay you all of your money if you would let us handle it, before we paid ourselves anything?
- A. No, I don't remember that. I don't think that was said. It might have been.
- Q. You don't recall very much about the transaction? You remember you had some people in there on a real estate deal at the same time, and that this conversation took place in the back office?
  - A. I remember it was in the back office, but

whether there was anybody in there about some real estate, I don't remember that. No, I don't remember that you were the attorney, or the man that was with Mr. Garrett.

- Q. You don't remember me at all?
- A. I remember Garrett, but I don't remember that you were the man.
- Q. Mr. Garrett is a more striking looking man than I.
  - A. Did you have a moustache then?
- A. No, I have never worn a moustache or any beard.

Mr. GEARIN: We will admit that you were the man.

Mr. BRONSON: I don't think of anything that I can recall now, to bring it any more clearly. That is all.

### RE-DIRECT EXAMINATION.

Q. Mr. Latourette, counsel asked you about some conversation between you as to their proposing to pay the bank's claim, or suggesting it might be paid. What was the bank's claim?

Mr. BRONSON: No, I didn't say that. I asked him whether or not he recalled that we proposed to him if he would let us have the sale of this property. That is another thing. Don't you remember that we stipulated that if you would let us have the handling of that machinery for a period of time of about a year, that we agreed with you that if we could not

sell it for enough to pay your claim and something on our own, we would sell it on your account?

- A. No, sir.
- Q. Don't you remember that we asked for time, or had Mr. Latourette, in other words, for some time?
- A. I don't think from me. I don't think you asked for any time. You may have from Mr. C. D. Latourette, possibly, but I don't think you did from me.
- Mr. BRONSON: No, I don't think we saw Mr. C. D. Latourette that day.

RE-DIRECT EXAMINATION (Resumed).

- Q. I put it the bank's claim, counsel says your claim. What was that?
  - A. You mean the amount of the claim?
  - Q. Yes, and the nature of it.
- A. About \$17,000, I think, at that time. There was a chattel mortgage and some notes, and an overdraft in the bank, and I think it ran up to some sixteen—fifteen or sixteen or seventeen thousand dollars.

#### RE-CROSS EXAMINATION.

Q. Don't you recall this, Mr. Latourette, that we spoke of the fact that you had security on more of this property than we had? In other words, you had security against all of that property, we only claimed a conditional sale against the part that we sold them?

## 114 F. T. Meyer vs. Pacific Machinery Co.

(Testimony of D. C. Latourette.)

A. No, no, I don't think there was anything of that kind said.

Witness excused.

F. T. Meyer, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

Questions by Mr. Gearin:

What is your business, Mr. Meyer?

- A. Banking.
- Q. Where?
- A. First National Bank, Oregon City.
- Q. Were you engaged in that business in the spring of 1911?
  - A. I was.
- Q. Do you recall the time of the sale by receivers of this property about which this litigation was started?
  - A. Yes, sir.
  - Q. Were you present at that time?
  - A. At the sale?
  - Q. Yes.
  - A. No, I was not.
  - Q. I will ask you if you bid in the property?
  - A. Our attorneys bid it in, Mr. C. D. Latourette.
  - Q. And they say the transfer was made to you?
  - A. To me, yes.

(Testimony of F. T. Meyer.)

- Q. Up to that time, Mr. Meyer, I will ask you if you were informed by anyone, or had any knowledge that the Pacific Machinery Company claimed title to that property or any part of it?
  - A. I did not know of any.
- Q. Do you remember Mr. Garrett and Mr. Bronson being there, at that time when the bids were opened?
  - A. I do not.
  - Q. Did you have any conversation with them?
- A. Well, if anybody would call, why, I would direct them to Mr. Latourette.
- Q. So nobody told you anything about it; you told nobody anything about it?
  - A. I didn't tell anybody.

### CROSS-EXAMINATION.

Quustions by Mr. Bronson:

You were acting in some capacity in the bank there that morning?

- A. Cashier.
- Q. Were you cashier?
- A. Yes.
- Q. I know you were cashier or teller. Don't you remember Mr. Garrett and me coming there to you before the bank opened?
  - . A. No, sir, I do not.
- Q. Your telling us that when we told you what our business was, that we would have to see Mr. Latourette?

(Testimony of F. T. Meyer.)

A. Well, now, it might have been you folks that came in, but if it was, I don't recognize you, because the thing of it is that the party that I think that was in there inquiring about the machinery or about the mill, had come in during banking hours, and I directed them to the banking room; that is, into the law office, to Mr. Latourette.

Q. Yes, but don't you recall, Mr. Meyer, Garrett and I coming in there before the bank opened?

A. No, I do not.

Q. Shortly before banking hours?

A. I do not recall it.

Q. Don't you remember our coming in there and telling you in substance that we had a claim on this property, and that we didn't want to buy it—bid it in; we understood the bank had some interest in it, and inquiring as to when we could see Mr. Latourette about it?

A. No, I haven't any-

Q. You don't recall Mr. Garrett and I coming in at all?

A. I do not.

Q. You are the cashier of the bank?

A. I am.

Q. And you bought this in for Mr. Latourette's account?

A. That is the idea.

Q. For the bank's account?

Witness excused.

J. J. Cook, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

## Questions by Mr. Gearin:

Mr. Cook, where do you live?

- A. Oregon City.
- Q. How long have you lived there?
- A. Oh, I have lived there all my life, practically.
- Q. Do you remember the time of the failure of the Oregon City Lumber Company?
  - A. Yes.
  - Q. Assignment for the benefit of their creditors?
  - A. Yes, sir.
  - Q. They made an assignment to whom?
  - A. To Mr. Moffitt and myself.
  - Q. You were the assignees under the statute?
  - A. One of them.
- Q. You took possession of all the property, did you?
  - A. Yes, sir.
- Q. You had a sale of that property up there, had you?
  - A. Yes.
  - Q. Do you remember when that sale was?
- A. I don't recall the day exactly, because it has been a long while ago. It has passed from my mind.
- Q. I think it is agreed it was some time in the spring of 1911.
  - A. Yes, 1911.
  - Q. Do you know Mr. Bronson or Mr. Garrett?

(Testimony of J. J. Cooke.)

- A. No, sir.
- Q. Do you recall seeing them in Oregon City at the time of that sale?
  - A. No. I don't remember seeing them before.
- Q. At the time of the sale, or up to that time, had anybody told you that the Pacific Machinery Company, or anyone, claimed title to any of that property?
  - A. No, sir.
  - Q. Outside of the Lumber Company?
  - A. No, sir.
  - Q. No such claim was made before the receiver?
  - A. No, sir.

Mr. BRONSON: You are asking, as far he is concerned?

Mr. GEARIN: Oh, yes.

- Q. How was the sale made? By sealed bids, was it?
  - A. I disremember now.
  - Q. At all events, it was sold to Mr. Meyer?
  - A. Yes.
- Q. And he was put in possession of the property, was he?
  - A. I presume so, yes. We turned it over to him.
  - Q. You sold it all?
  - A. Yes.
  - Q. The building and leasehold, whatever it was?
  - A. Yes.
  - Q. This machinery that is talked of here, do you

(Testimony of J. J. Cooke.)

recognize what we are talking about, the machinery that is involved here?

- A. I think I do, yes.
- Q. State whether or not that was a part of the building?
  - A. Well, the machinery was in the building.
  - Q. Yes, affixed to the building?
  - A. Yes.
  - Q. For the purpose of a sawmill?
  - A. Yes.
- Q. At that time, Mr. Cook, what business were you in?
- A. I was in the hardware and implement busines at that time.
  - Q. Now, where was your store situated?
- A. Well, it is in the same block, this side of where the bank is.
  - Q. You have been in that business ever since?
- A. Until about a year ago. I am in the post-office now.

#### CROSS-EXAMINATION.

# Questions by Mr. Bronson:

Mr. Cook, where is Mr. Moffitt?

- A. I don't know where he is. I understood he was in California.
  - Q. Who made the sale, you or Mr. Moffitt?
  - A. I don't remember which one of us.
  - Q. You don't remember which one?
  - A. No, we was there.

J

(Testimony of J. J. Cooke.)

Q. Is your office, or did he have an office on the opposite side from the bank, and either a little toward Portland as the street railroad runs, or else just a litle way the other way and upstairs, at that time? Did one of you have an office there?

A. I disremember where his office was. Mine was in the store, though, in the same block this side.

Q. Down on the ground floor?

A. Yes, sir.

Q. Well, then, didn't he have an office across the street?

A. I don't know.

Q. This sale really consisted of opening a bid, or opening a letter? That is what it amounted to, isn't it?

A. I forgot. I disremember postively just how the sale was made.

Q. You don't remember. I want to be perfectly frank—we haven't any desire to win this case by any possible misrepresentations. I will state to the Court frankly I don't know whether it was Mr. Cook or Mr. Moffitt in that particular. My memory in that regard is as defective as his. I only remember certain transactions in connection with it.

### RE-DIRECT EXAMINATION.

Q. Where is Mr. Moffitt, do you know now?

A. I don't know where he is. I understood he had gone to California with his family.

(Testimony of J. J. Cooke.)

Q. You recall now, Mr. Cook, that notices were published of that sale in the newspaper?

A. Yes, sir.

#### RE-CROSS EXAMINATION.

- Q. Mr. Cook let me ask you a question. Do you remember a discussion which took place that day with reference to a prior mortgage on this property held by a man in California?
  - A. No, sir.
- Q. Whose rights were claimed to be better than both the Latourette claim and our claim?
  - A. No, sir.
  - Q. You don't remember anything about that?
  - A. No, sir.

Witness excused.

C. D. Latourette, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

### DIRECT EXAMINATION.

Questions by Mr. Gearin:

Mr. Latourette, you are an attorney, and reside at Oregon City?

- A. Yes, sir.
- Q. You are attorney for the bank—what is the name of the bank?
  - A. The First National Bank.

122

(Testimony of C. D. Latourette.)

- Q. Do you recall the transaction with reference to this machinery with the Lumber Company, the Pacific Machinery Company, and the time of the sale, and all of that?
  - A. Yes, sir.
- Q. You had charge of this proceeding as attorney for the bank, did you?
  - A. Yes, and for the assignees.
- Q. For the assignees. And did you prepare the papers, the notices of sale and publication, and such proceedings as were had with reference to it?
- A. Yes, sir. The sale was to be on sealed bids, and there was publication in the Portland papers, or at least one of them, and then there were postal cards, printed notices of the sale, sent out to a good many mill people: published also in the Oregon City paper.
  - Q. Were you there at the opening of the bids?
  - A. Yes.
  - Q. Who else was there?
- A. Well, I don't recollect about that. There was no bid except the bid of the bank, or of Mr. Meyer for the bank.
- Q. Mr. Meyer made a bid, and it was the only bid?
  - A. Yes.
  - Q. And the property was sold to Mr. Meyer?
- A. Yes, sir. And a bill of sale made at the time by the assignees, both of them.
  - Q. Had you, as attorney for the bank, or as

attorney for the receiver, or in any capacity, or at all, ever been informed up to that time that the Pacific Machinery Company claimed any title to that property?

- A. No, sir, none whatever.
- Q. When did that matter first come to be talked of?
- A. Well, on the day of the sale the Garrett brothers came up—
  - Q. Garrett brothers?
  - A. Yes, sir.
  - Q. Both of them?
- A. I think they were both there. I know this gentleman was there. That sale had ben put off, postponed for several months, at the request of Mr. Garrett.

Mr. BRONSON: What is that, Mr. Latourette? I cannot hear what you say.

A. It had been postponed—the advertisement of the sale had been postponed because Mr. Garrett was figuring on organizing a company to take over that property, and it was understood that his brother—this gentleman here—was coming up from California, and we held the sale off until a time when this Mr. Garrett would be able to be here. And there was an understanding between the other Mr. Garrett and this one, too, when he came that morning, that we were to bid that property in, and that the Garretts, or they had connections they said, by which they could organize a company, and take

that properly over at what we had in it, or what the bank had in it, with the interest. That is all we wanted to get out of it—all we expected to get. And I think they were both there that morning, and Mr. Bronson, too, as I remember. But I don't think they stayed to the sale.

- Q. They knew of the sale?
- A. Oh, yes, they knew of the sale. And after the sale—now, the understanding was that they were to pay five thousand dollars down, and have terms on the balance. Shortly after the sale, the other Mr. Garrett who was residing in Portland came up and said that they were unable to raise five thousand dollars, and wanted to have the property turned over on the payment of two thousand dollars. And after some little talk, and I think consultation with my partner, I told him that we would be satisfied.
- Q. Well, now, you mean upon payment of two thousand dollars, and what provision was to be made for the balance of the bank's claim?
- A. Well, they were to make quarterly payment of the balance.
  - Q. How much was the bank's claim?
- A. Well, I forgot how much that was. At that time, I think they owed the bank about fourteen thousand dollars. It might have been twelve.
  - Q. The bank had a mortgage, didn't it?
  - A. Yes.
  - Q. Now, go right along with your story.

A. So then he went off to Portland again, and it ran along for some little time—probably it might have been two or three weeks.

Mr. BRONSON: Is there anything material, Mr. Gearin, in any subsequent transactions?

Mr. GEARIN: It is only the conversation that was had right down here.

Mr. BRONSON: I have no particular objection only it is filling the record.

Q. You came down to Portland?

A. One day I got a telegram from Mr. Garrett wanting to know if I could come down. I told him I would be down in the afternoon. He said that Mr. Bronson was over from Seattle and wanted me to come down. I think I came down early, and Mr. Moffitt came with me. He said he wanted to see me about that machinery, and so when I got down here, Mr. Bronson was in their Office, and Mr. Bronson did most of the talking, and he said he wanted us to turn that machinery over, the whole plant over to Garrett, and give them two years to make the first payment, taking it out what we had in it. Well, I says, "Mr. Bronson, we can't do that."

Mr. BRONSON: We made a number of propositions to settle this thing since. I don't think they are material.

Mr. GEARIN: I want to show this is the first time Mr. C. D. Latourette ever heard of the claim of the Pacific Machinery Company.

Mr. BRONSON: He has testified to that.

Mr. GEARIN: No, he hasn't.

Mr. BRONSON: He said he didn't know about it before.

A. Then Mr. Bronson said, "If you don't do that"-of course there was some more talk-if you don't want that I won't give it, at that meetingbut Mr. Bronson said, "Well, if you don't do that, we are going to make a claim for that machinery." "Why," I says, "what do you mean?" and he says, "Conditional sale contract." "Well," I says, "where is your conditional sale contract?" "Well," he says, "we haven't got any in writing, but," he says, "we were to get one." "Well, now," I says, "this is a pretty time to speak about anything of that kind." And I got up and I told him that we couldn't consent to giving him two years on the first installment, after they had agreed to pay five thousand dollars down, and then I had come down to two thousand dollars.

Q. Is that the first time that you ever heard of this conditional sale?

A. That is the first time that I ever heard of it, yes.

Q. Where is Mr. Moffitt?

A. I heard he was in California. I think he has been down there for several weeks.

#### CROSS-EXAMINATION.

Questions by Mr. Bronson:

We have had a number of conversations, your-

self and myself, Mr. Latourette, subsequent to that time, and proposals?

- A. I don't think we ever talked any except that morning of the sale that you were up there. I cannot recollect now, Mr. Bronson.
- Q. Didn't I meet you a few months later, down here in Portland, and have a talk with you in Portland, up here at this Club here?
  - A. A few months later?
  - Q. Yes.
  - A. Where? At what place.
- Q. Up at the Club, about a block or two beyond the Portland Hotel?
- A. Yes, I remember meeting you up there. That was since the sale.
  - Q. We had a talk there about it, too, didn't we?
  - A. Since the sale, yes.
- Q. We had a talk here three or four months ago about a settlement? All I am getting at—we have had a number of conversations trying to adjust this matter?
  - A. I think perhaps three different occasions.
- Q. Well, now, you were present when we talked with the other Mr. Latourette in Oregon City?
- A. Why, I remember when you came in there, and we were both there. I don't know how many times you talked with him. I remember when you came in.
  - Q. Where did this sale take place?
  - A. There at our office.

- Q. In the bank?
- A. Yes.
- Q. And the sale consisted simply in opening a letter, didn't it?
  - A. Yes; sealed bid.
  - Q. You were attorneys for the assignees?
  - A. Yes.
- Q. You were attorneys for the bank, and attorney for Mr. Meyer?
- A. Well, I was not acting then for the bank. I was acting for the assignees. I was not acting for Meyer—I was acting for the assignees at that time.
- Q. But Mr. Garrett and I did not attempt to negotiate with you at that time. We had been turned over to the other Mr. Latourette as the man who would handle any settlement that was made, weren't we?
- A. Well, I don't know whom you had been turned over to. I knew that you were figuring. The Garrett's claim was the largest claim outside of the bank, and I understood they were interested in trying to get their money. They had agreed to take stock for their claim.
- Q. We had a number of different propositions that were suggested, didn't we?
  - A. What?
- Q. I say, a number of different propositions during the day, were suggested by Mr. Latourette, or by ourselves, with reference to this matter?
  - A. I don't think that any but one proposition

except as to the amount that they were to pay down.

- Q. Hadn't that proposition of buying this whole mill—pour property, I mean to say, the mill including all that your chattel mortgage covered—that had been taken up with Mr. Tom Garrett several weeks prior, hadn't it?
  - A. To the sale?
- Q. Prior to the sale. What I mean is this: Prior to this sale, say just roughly two or three weeks or a month, there had been some negotiations between Mr. Tom Garrett and the bank down there, with reference to buying all of the machinery in the mill—everything—not simply what we had sold them, but all of it?
- A. The sale was put off to accommodate him, to oblige him.
- Q. And that was on the theory that perhaps he could arrange a scheme to buy the whole mill?
  - A. Yes.
- Q. Now, that was one of the things, of course, you were talking about the day the sale took place?
- A. Oh, yes. I think Mr. Garrett was up a number of times.
- Q. Are you positive, Mr. Latourette—I am not impeaching your word, of course; I know that—but are you positive at this time that either Mr. Edward I. Garrett or myself, or Mr. Thomas Garrett ever said anything about the fact that we had sold this machinery to the Oregon City Lumber & Manufacturing Company, upon agreement for conditional

sale, and that we were asserting that we had some rights there?

- A. Yes, you never—
- Q. What?
- A. You nor no one else ever intimated to me until that meeting.
- Q. I am not saying to you. I am simply saying as to what you might have heard from your brother.
  - A. No, sir, I never heard anything about it.
- Q. We didn't have much negotiation with you that day, did we?
  - A. Down here?
- Q. Down at Oregon City on the day of the sale. You were not then negotiating with Mr. Edward I. Garrett and myself. You did not conduct the negotiations?
- A. Well, my recollection is, Mr. Bronson, that Mr. Garrett, the younger Garrett—
- Q. I don't say anything about—Mr. Thomas Garrett was not there at that time at all.
- A. Well, maybe not, but I say before that, we had everything all worked up, as I understood, and he was waiting for his brother to come.
- Q. That may be. I am not discussing that with you at all. I am merely asking you whether or not at the date of the sale Mr. Edward Garrett and I dealt with the other Mr. Latourette—if that is not the fact?
  - A. Well, I don't have any recollection about how

(Testimony of C. D. Latourette.)

much conversation we had, but Mr. Garrett understood the arrangement that was to be made.

- Q. Oh, that all may be.
- A. He told me that.
- Q. The arrangement never was perfected; that is all, isn't it?
  - A. Well, he never came through.
- Q. There was a proposition made, but it never was finished out into an agreement?
  - A. That is right.

Witness excused.

Defendant then rested.

At the close of all the testimony and before the Court had rendered its decision, the defendant tendered and requested the Court to make and find the following

# FINDINGS OF FACT AND CONCLUSIONS OF LAW.

I.

That on or about the 29th day of April, 1909, the plaintiff sold to the Oregon City Lumber & Manufacturing Company, a corporation under the laws of Oregon, all of the personal property described in Plaintiff's Complaint herein and delivered the said property to the said Oregon City Lumber & Manufacturing Company at various times during the

spring and summer of 1909, the last delivery being made about the 9th day of September, 1909.

#### II.

That said machinery was sold to the said Oregon City Lumber & Manufacturing Company for the purpose of having the same installed in and to become a part of a mill then in course of remodeling by said Oregon City Lumber & Manufacturing Company, and that the plaintiff had full knowledge at the time of such sale of the purpose for which said machinery was purchased and would be used. That when the said machinery was received by the said Oregon City Lumber & Manufacturing Company it was immediately affixed to and became a part of the said mill owned by said Oregon City Lumber & Manufacturing Company and still remains so attached to and a part of said mill.

#### III.

That on or about the 11th day of November, 1909, said Oregon City Lumber & Manufacturing Company became insolvent and made an assignment of all of its property, including the property described in the plaintiff's complaint, for the benefit of its creditors.

#### IV.

That on the 21st day of April, 1911, after having given due notice as provided by statute, the assignees of said Lumber Company duly and regularly sold all of said property to the defendant in this suit and delivered possession thereof to said de-

fendant. That the plaintiff in this suit had actual notice thereof and was present at the time of said sale and made no objection thereto.

#### V.

That no formal written contract was ever entered into between the plaintiff and said Oregon City Lumber & Manufacturing Company and that the only writing in relation thereto was the paper introduced in evidence by plaintiff, marked Exhibit "A," and is in words and figures as follows:

"Portland, Oregon, April 29, 1909. Oregon City Lumber & Mfg. Co.,

Oregon City, Oregon.

#### Gentlemen:

We propose to furnish you machinery in accordance with attached specification for the sum of \$4695.00, including a 11x14 Beck type engine feed, which is not mentioned in the specifications, delivery to be made at Portland. Terms to be \$1500.00 cash on arrival of the machinery, balance to be paid in equal payments of two, three, four, and five months dating from shipment of machinery. Transaction to be covered by machinery contract, with notes on deferred payments bearing interest at 5%, notes to be endorsed by the Company as well as by your Mr. Bohn and Mr. Collins, personally.

Yours truly,
PACIFIC MACHINERY COMPANY,
Thos. Garrett, Mgr.

134 F. T. Meyer vs. Pacific Machinery Co.

Accepted.

Oregon City Lumber & Manfg. Co., By Wm. C. Bohn, Prest., George W. Collins."

#### WITH

"Specifications of Saw Mill Machinery for Oregon City Lbr. & Mfg. Co., Oregon City, Oregon, from Pacific Machinery Company, Portland, Oregon," attached.

#### VI.

That the defendant is now and ever since the 21st day of April, 1911, has been in possession in Clackamas County, Oregon, of the personal property described in Plaintiff's Complaint, and of the mill, mill building and property to which said personal property was and still is attached, as set out in Finding II.

#### VII.

That no memorandum of the sale evidenced by said written memorandum described in Finding V herein, stating the terms of said sale or any description of the said personal property or signed by the vendor or vendee, nor any memorandum whatever was ever filed in the County Clerk's office or Recorder's office of the said County of Clackamas, at any time.

As to Conclusions of Law, the Court finds:

I.

The transaction between plaintiff and the Oregon

City Lumber & Manufacturing Company, evidenced by said written offer and acceptance, as set out in Finding V herein, was an absolute and not a conditional sale and vested the complete title in the Oregon City Lumber & Manufacturing Company.

#### II.

That when said personal property became affixed to the mill building it became a part of the realty and was no longer a subject of replevin.

#### Ш.

That the plaintiff by permitting the sale by the Receivers of the Oregon City Lumber & Manufacturing Company to the defendant and by being present at said sale and by not objecting thereto must be held to have waived any rights which up to that time it might have had and is now estopped to assert such or any rights in opposition to the title of the defendant to said property.

#### IV.

That by the provisions of Section 7414, Lord's Oregon Laws, although the transaction of April 29, 1909, might have been intended by the plaintiff to have constituted a conditional sale, retaining title to the property in plaintiff, yet plaintiff not having filed said paper in accordance with the provisions of said section, the condition became void and the title vested absolutely in the Oregon City Lumber & Manufacturing Company.

V.

That defendant is entitled to judgment for his costs and disbursements.

The Court refused to make or find the foregoing Findings of Fact and Conclusions of Law, or any of them, and the defendant was duly allowed an exception to said ruling as to each of said requested Findings of Fact and Conclusions of Law.

The foregoing proposed Findings of Fact and Conclusions of Law, as they do not appear upon the record, are hereby incorporated by the defendant into this, its Bill of Exceptions.

Hereunto annexed are all the exhibits mentioned in the foregoing transcript of the testimony offered and received upon the trial, and the said transcript and the said exhibits constitute all the evidence offered and received upon the trial of said cause, and the said exhibits are hereby by reference thereto, made a part of this Bill of Exceptions, which is signed, settled and allowed by me this 9th day of November, 1916.

CHAS. E. WOLVERTON,

Judge.

Filed November 9, 1916.

G. H. MARSH, Clerk.

The exhibits offered and received upon the trial of said cause, referred to in the foregoing Bill of Exceptions and not included therein, are in words and figures as follows, to-wit:

#### DEFENDANT'S EXHIBIT 2.

Portland, Oregon, Dec. 9, 1909.

We have examined the attached proposition of reorganization of the Oregon City Lumber & Manufacturing Co., as proposed by the creditors of said company whose signatures appear to said list. From it, we gather that the following is the scheme:

That the said corporation's authorized capital stock at this time is \$75,000; that of this \$41,000 has been subscribed and paid in. That it is proposed to increase this to \$100,000 as provided by statute.

That the creditors will then take \$50,000 of the increased capitalization, or an amount equal to their total claims against said concern, whether it be more or less.

That said stock is to be issued to them under such an arrangement of the by-law as will make said stock preferred and will be issued to the creditors of said concern signing said list in an amount equal to their respective claims upon the surrender to the corporation of such claim, stock to be issued as fully paid up and non-assessable, the surrender of the claim to be taken as payment therefor.

That the holders of this preferred stock shall then taken over the management of the affairs of this corporation, free and clear of any interference on the part of the original holders and operators thereof, and continue to manage it until such time as the proceeds from said management shall satisfy all of said claims or retire said preferred stock in pursuance of the by-laws to provide for said retirement, together with 6% annual dividends to be guaranteed thereon.

That when said stock is taken up and retired, and the face and dividends earned thereon paid, that the management and control of said corporation shall be returned to the original stockholders thereof.

That subscribing and signing of this statement and consenting to said arrangement does not bind the undersigned to advance or subscribe any cash to the advancement and carrying out of this arrangement, and they shall not be considered and held as liable for the payment of any cash, or assuming any liability in connection therewith, further than the cancellation of their said claim, and that any payments of advancement of cash hereafter to be used in the operation of said plant by these or other of said creditors signing said list shall be wholly voluntary on their part, and a matter to be hereafter considered.

CLARKE WILSON LUMBER CO\$ 2	01.94
By G. W. Stapleton, its atty.	
OREGON LUMBER CO 11	27.45
By G. W. Stapleton, atty. for clam't.	
Francis Welsh 4	28.70
Harvey O'Bryan 4	89.45
J. P. Johnson	32.00
Larsen & Co	43.65
Oregon City Enterprise	47.25

IN CONSIDERATION of the promise of the directors and officers of the Oregon City Lumber & Manufacturing Company to reorganize the affairs of said Company and to relieve the said Company from its embarrassing position, and other considerations, we, the undersigned, hereby subscribe to the capital stock of said corporation the number of shares set opposite our names at \$100.00 each, upon the understanding and express agreement, to-wit:

That said shares of stock are to be delivered to us upon condition that the same shall be an offset against the claims that we now have against said Company, and the certificates of such stock shall read to be non-assessable and to be of the first issue of \$50,000, preferred stock of said Company, said stock to return dividends of 6% per annum, payable before any dividend shall be declared upon common stock, and that said stock shall be retired and taken up by order of the directors of said Company at any future time by payment of the face value thereof, together with 6% per annum since the last dividend theretofore declared thereon, but it being understood that a retirement of such stock shall be pro rata upon the amount issued, and not otherwise; and that the said corporation shall not be capitalized by any supplemental articles, or otherwise, in excess of the sum of \$100,000 without the express consent in writing of each and every holder of such preferred stock.

Dated November 9th, 1909.

## 140 F. T. Meyer vs. Pacific Machinery Co.

J. W. Moffiatt, Oregon City, Ore\$	3 2,000.00
E. W. Barnes	11,255.54/100
Portland Machinery Co., T. H. Comer-	
ford, Treasurer	106.87
J. E. Haseltine & Co., W. C. Haseltine,	
Sec	251.42
Pacific Machinery Co., by Ira Bron-	
son, Atty., approx	5,724.86
Smith & Watson Iron Works, Robt.	
Collier, Secy	486.66
Crane Co., by E. H. Webb, Cashier	215.28
Willamette & Columbia River Towing	
Co., by W. E. Jones, Sec	400.00
Standard Box & Lbr. Co	736.09
S. P. H. Lumber Co., Portland, Ore	688.10
Oregon Kansas Lumber Co., by W. D.	
Jellison, Pt	673.35
Donald Lumber Co., by G. W. Evans,	
Pres	383.71
John A. Roebling's Sons Co., per L. H.	
Parker	246.56
A. J. Harper	430.85
Central Door & Lumber Co	1,266.63
A. Stepani	1,577.12
Portland Iron Works, by H. T. Clarke,	
Prest	129.80
E. H. Mills & Co	105.79
Kalama Logging Co	2,735.51
Kelley Bros	129.00
Redland Lumber Co., by U'Ren &	
Schuebel, Attys	800.00

Nott-Atwater Company, per E. J.
Munnell, Secy
Greenwood Lumb. Co., per O. A.
Wheeler 331.46
The Machine Manufacturing Agency,
M. R. Colby
Beaver Lumber Co., by R. F. Barker,
Pres
On condition that this subscription for preferred
stock is to be paid for by the Beaver Lumber Com-
pany's claim against said Oregon City Lumber &
Mfg. Company for the amount of this subscription,
and that all creditors of said Oregon City Lumber
& Mfg. Co. whose claims exceed \$100.00 each join
in this arrangement on or before December 31, 1909,
and that in the reorganization of said Oregon City
Lumber & Mfg. Co., provision be made for the man-
agement and operation of said company until the
preferred stock hereby subscribed for is paid for
by persons selected by the creditors who sign this
document.
The Paraffine Paint Co., R. S. Shainwald,
Secy
Redland Lumber Company, by F. W. Sprague 200.00
Dix Bros. Lumber Co
J. A. Cottrell Moulding Co., by Clarence H.
Gilbert, Atty
Rulefson & McKenny
John Wood Iron Works
Filed January 4, 1916.

#### DEFENDANT'S EXHIBIT 3.

Portland, Ore., July 23rd, 1909.

Oregon City Lumber & Manfg. Co., Oregon City.

Pacific Machinery Co.
49 First Street.

Dealers in all kinds of Machinery and Mill Supplies.

Interest at 10% per annum charged on all Past Due Accounts.

To Balance—

\$6328.54

On May 5th, 1909, we received \$100.00. Deduct this amount from \$2035.54 that is due upon execution of this contract. In other words, get a check for \$1935.54 and the notes signed, also contract.

Filed January 4, 1915.

G. H. MARSH, Clerk.

#### DEFENDANT'S EXHIBIT 4.

THIS EXECUTORY CONTRACT made and entered into this 23d day of July, 1909, at the City of Portland, County of Multnomah, State of Oregon,

by and between the Pacific Machinery Co. (a corporation organized under the laws of the State of Washington), party of the first part, and Oregon City Lumber & Manufacturing Co., of the City of Oregon City, County of Clackamas, State of Oregon, the party of the second part, witnesseth:

The party of the first part agrees:

That it will upon the full performance by the party of the second part of all the agreements as hereinafter set out, sell, grant and deliver to the said second party the personal property described as follows:

- 1 No. 4A Mitts & Merrill hog complete with regular trimmings.
- 5 H. P. Sterling vertical engine 4x5 complete with regular trimmings.
- Bartlett combination lath mill and bolter complete with regular trimmings, including six S. F. saws.
- Combination lath lumber and trimmer complete except saws.
- Prescott 14 saw undercut trimmer complete 1 with all necessary iron work and all necessary wood work and 476' table chains.
- Slab slasher for 7 saws. 1

#### SEC. 24.

- Shaft 2 15/16x4' 8" K. S. 1
- 5 T. sprocket for 7/8x6 chain ftd. 1
- Spur gear 30x4 ftd. 1
- Shaft 2 7/16x5′ 3″ K. S. 1

## 144 F. T. Meyer vs. Pacific Machinery Co.

- 1 Spur pinion  $(6\frac{1}{4}x4\frac{1}{4})$  ftd.
- 1 Bevel iron friction 36x8 ftd.
- 1 Shaft 2 7/16x11' 6" K. S.
- 1 12x9x27/16 Bevel paper friction ftd.
- 2 Shafts 2 7/16x4' K. S.
- 2 20x20 Double out end drums ftd.
- 1 Shaft 2 15/16x4 K.S.
- 1 20x20 Double out end drum ftd.
- 200'  $\frac{7}{8}$ x6 long link chain.

#### SEC. 29.

- 1 Shaft 1 15/16x4' 6" K. S.
- 3 Sprockets 15 T. No. 78 chain ftd.
- $30' \frac{1}{4}x3\frac{1}{4}$ . Flat iron with  $\frac{1}{4}$ " screw holes.
  - 1 Shaft 17/16x12 K.S.
  - 2 Sprockets 15 T No. 78 ftd.

## Sec. 26.

- 1 Shaft 1 15/16x7' K. S.
- 1 Spur paper friction 6x7x1 15/16 ftd.
- 1 Sprocket 10 T No. 78 ftd.
- 1 Shaft 2 7/16x5' K. S.
- 1 Eccentric box 1 15/16.
- 1 Spur iron friction 36x6.

#### Sec. 28.

- 1 Shaft 2 7/16x3' 6" K. S.
- 1 Sprocket 9 T No. 104 ftd.
- 1 Bevel gear 22x3¾ ftd.
- 1 Shaft 1 15/16x6' K. S.
- 1 Bevel pinion  $5\frac{5}{8}x3\frac{3}{4}$  ftd.
- 1 Sprocket 9 t. No. 104.

#### Sec. 37.

- 1 Shaft 2 7/16x3' K. S.
- 1 Spur gear 24x3.
- 1 Sprocket 9 T. No. 104.
- 1 Shaft 1 15/16x3' 6" K. S.
- 1 Spur pinion  $4 \frac{3}{16} x \frac{31}{4} x \frac{31}{4}$  ftd.
- 1 Sprocket 9 T. No. 104 ftd.

#### SEC. 9.

- 1 Shaft 27/16x4' K. S.
- 1 Sprocket 9 T No. 104 ftd.
- 1 Spur gear 60 T 11/4 P: 3" F. ftd.
- 1 Shaft 1 15/16x5' K. S.
- 1 Spur pinion 15 T. ftd.
- 2 Sprockets 9 T. No. 104.

### SEC. 6.

- 1 Shaft 27/16x4 K. S.
- 1 Sprocket 9 T. No. 104 ftd.
- 1 Spur gear 24x3 ftd.
- 1 Shaft 1 15/16x4' ftd.
- 1 Spur pinion 15 T. ftd.
- 1 Sprocket 9 T. No. 104.

#### Sec. 36.

- 1 Shaft 2 7/16x22' 6" K. S.
- 3 Sprockets 15 T. No. 78 ftd.
- 1 Spur gear 24x3 ftd.
- 1 Shaft 2 7/16x7' 8" K. S.
- 1 Spur pinion 15 T. ftd.
- 1 Spur iron friction ftd.
- 1 Shaft 1 15/16x7' 8" K. S.

## 146 F. T. Meyer vs. Pacific Machinery Co.

- 1 Spur paper friction ftd.
- 1 Steel split pulley 16x6x1 15/16.
- 1 Eccentric box 1 15/16.

#### SEC. 40.

- 4 Lengths 2 15/16 shaft coupled and K. S.
- 3 Pair 2 15/16 safety flange couplings ftd.
- 2 Lengths 2 7/16 shaft K. S. and coupled.
- 1 Pair reducing flange couplings 2 15/16x2 7/16 ftd.
- 1 Pair flange couplings 2 7/16 ftd.
- 1 Sprocket 36" No. 124 ftd.
- 3 Bevel pinions 14 T. 11/4 P. 33/4 F. ftd.
- 3 Shafts 2 7/16x5' K. S.
- 3 Bevel gears 55 T. 11/4 P. 33/4 F. ftd.
- 3 Sprockets 12 T. No. 78.
- 3 Shafts 2 3/16x16' K. S.
- 6 Sprockets 12 T. No. 74 ftd.
- 6 Sprockets 12 T. No. 74 ftd.
- 3 Sprockets 12 T. No. 74 ftd.
- 3 Sprockets 12 T. No. 78 ftd.
- 3 Sprockets 12 T. No. 78 ftd.

#### SEC. 18.

- 1 Shaft 2 7/16x7 6" K. S.
- 1 Spur iron friction 36x8 ftd.
- 1 Sprocket 12 T. No. 124 ftd.
- 1 Shaft 2 7/16x8 K. S.
- 1 Spur paper friction 12x9 ftd.

<sup>200&#</sup>x27; No. 78 riveted chain.

<sup>180&#</sup>x27; No. 104 & C do

- 320' No. 104 & C do
  - 40' No. 124 riveted chain.
- 900' No. 74 do
  - 90' No. 78 riveted chain.
- 300' No. 74 do with N attach, every other link.
  - 25' No. 82 riveted chain.
  - 90' No. 104 & C do
    - 1 11x14 Pawling & Harnischfeger Beck twin engine feed.

#### WOOD SAW MACHINE.

- 1 Arbor 2 15/16x8′ 11″ in 3 sections coupled.
- 2 Pair saw collar couplings ftd.
- 3 Post Boxes 2 15/16.
- 2 Set collars 2 15/16.
- 1 C. I. Web center arbor pulleys 24x10.
- 1 C. I. Pulley 10x6 ftd.
- 1 Shaft 1 15/16x8' 2" K. S.
- 6 Sprockets 11 T No. 74 ftd.
- 1 Sprocket 30 T No. 74 ftd.
- 3 Post boxes 1 15/16.
- 1 Shaft 17/16x4 5" K.S.
- 1 Sprocket 11 T. No. 74 ftd.
- 5 Sprockets 11 T. No. 74 ftd.
- 4 Solid boxes 1 7/16x13/4.
- 8 Set collars 1 7/16.
- 34′ 1/8x21/2 flat rolled iron drilled and C. S.

#### WOOD SAW DRIVE RIG.

- 1 Shaft 1 15/16x4' K. S.
- 1 C. I. Pulley 30x6 ftd.
- 1 Spur paper friction 6x7 ftd.
- 1 Set collar 1 15/16.
- 1 Sliding box 1 15/16.
- 1 Flat box 1 15/16.
- 1 Shaft 1 15/16x4' K. S.
- 2 Flat boxes 1 15/16.
- 1 Spur iron friction 30x6x1 15/16 ftd.
- 1 Sprocket 11 T. No. 74 ftd.

#### Sec. 10.

- 1 Shaft 2 7/16x22' K. S.
- 3 Sprockets 12 T No. 78 ftd.
- 1 Bevel friction 36x8.
- 1 Shaft 1 15/16x11' 8" K. S.
- 1 Bevel friction 6 1/16x3½ ftd.
- 1 C. I. Pulley 18x8x1 15/16 ftd.
- 1 C. I. Pulley 16x6x1 15/16 ftd.

#### SEC. 17.

- 1 Shaft 1 15/16x5' 6" K. S.
- 1 Bevel gear  $19 \frac{1}{16} x \frac{31}{4}$  ftd.
- 1 C. I. Pulley ftd. 20x6.
- 1 Sprocket 9 T No. 74 ftd.
- 1 Shaft 1 15/16x5' K. S.
- 1 Bevel pinion ftd.
- 1 C. I. Pulley 24x6x1 15/16 ftd.

#### SECS. 16-19.

1 Shaft 3 15/16x16′ 6″ K. S.

## 1 Pair bevel mortise gears.

#### SEC. 70.

- 1 Shaft 1 15/16x3' K. S.
- 9 T. No. 104 sprocket ftd. 1
- Shaft 2 7/16x24 K. S. 1
- 2 Sprockets 15 T No. 78 ftd.
- 1 Sprocket 12 T No. 87 ftd.
- Bevel gear 32x5 ftd. 1
- 1 Shaft 1 15/16x6' K. S.
- 1 Bevel pinion 77/2x5 ftd.
- 1 Shaft 2 7/16x3' 6" K. S.
- Sprocket 13 T No. 87 ftd. 1
- 1 24x6x1 15/16 C. I. Pulley.
- Shaft 2 7/16x3' 8" K. S. 1
- Sprocket 9 T. No. 104 ftd. 1

#### SECS. 2-3.

- Shaft 3 7/16x6′ 3″ K. S. 1
- 1 Shaft 3 15/16x12' 8" K. S.
- 1 Pr. 3 15/16x3 7/16 dental clutch couplings ftd.
- Shaft 3 15/16x14' K. S. 1
- 1 Pr. 3 15/16 safety flange couplings ftd.
- $5 \quad 2 \quad 3/16$  flat boxes.
- 27 2 7/16 flat boxes.
  - 17/16 Shifter hub and fork (Sec. 10). 1
  - 26x6x1 15/16 S. S. Pulley (Sec. 9). 1
  - 1  $26x6x1\ 15/16$ (Sec. 6). do
  - 1 24x8x2 7/16 do (Sec. 18).
  - 1 8x4x2 7/16 W. S. Pulley (Sec. 18).
  - 1 30x8x2 7/16 S. S. Pulley (Sec. 24).
  - 1 27/16 Shifter hub and fork (Sec. 24).

## 150 F. T. Meyer vs. Pacific Machinery Co.

- 1 36x6x1 15/16 S. S. Pulley (Sec. 26).
- 1 36x4x1 15/16 do (Sec. 28).
- 1 Shaft 1 15/16x3' do (Sec. 37).
- 1 20x4x1 15/16 S. S. Pulley (Sec. 37).
- $20 ext{ } 17/16$  Solid boxes.
  - 1 Shaft 2 7/16x19' 6".
  - 1 Shaft 2 7/16x9' 6".
  - 1 Shaft 1 15/16x20'.
  - 1 Shaft 17/16x16'.
  - 1 Shaft 1 15/16x20' K. S.
  - 1 Shaft 1 15/16x20' K. S.
  - 1 Shaft 2 7/16x20' K.S.
  - 1 Shaft 2 7/16x16' K. S.
  - 2 Pr. 1 15/16 couplings ftd.
  - 1 Pr. 27/16 couplings ftd.
  - 1 Pr. 3 15/16 safety flange couplings.
  - 2 Shafts 2 7/16x3' 6".
  - 1 Shaft 2 7/16x6' 7".
  - 1 Shaft 27/16x3'.
  - 2 Shafts 2 7/16x10'.
- 10 27/16 flat boxes.
- 4 2 15/16 flat boxes.
- 22 2 7/16 set collars.
- 13 27/16 flat boxes.
- 30 1 15/16 do.
  - 2 2 15/16 do.
  - 4 2 3/16 do.
  - 4 3 15/16 do.
  - 1 1 15/16 Eccentric box.
  - 2 2 7/16 do.

- 15 1 15/16 Set collars.
- 14 2 7/16 do.
  - 4 2 15/16 do.
  - 2 2 3/16 do.
  - $3 \ 3 \ 15/16$  do.
  - 2 16x4x1 15/16 Philips' steel pulleys.
  - 1 10x4x1 15/16 do.
  - 1 6x3x15/16 wood pulley.
  - 1 14x6 Steel split pulley—Philips'.
  - 1 3 15/16 Flat box babbitted.
- 12 1 15/16 Safety set collars.
  - 6 2 7/16 do.
  - 1 32x8 Phillips' steel split pulley.
  - 1 Box (55 lbs.) Sterling Babbitt.
- 10' No. 74 Chain "N" Attachments every other link.
  - 2 27/16 Set collars.
  - 4' 2 7/16 1/4 W. P. Bushing.
  - 1 Shaft 1 15/16x7' 3" K. S.
  - 5' 1 15/16 wood pulley bushing.
- 180' No. 78 riveted chain.
  - 90 Attachments "B" for above.
  - 20' No. 87 Riv. Chain.
    - 5 Sheets red friction paper.
    - 1 Shaft 1 15/16x20'.
    - 1 Shaft 1 15/16x11'.
    - 1 16x6x3 15/16 W. S. Pulley.
    - 1 14x8x3 15/16 W. S. Pulley.
    - 1 12x8x3 15/16 W. S. Pulley.
    - 1 8x6x3 15/16 W. S. Pulley.
    - 1 12x8x2 15/16 S. S. Pulley.
    - 2 10x6x2 15/16 S. S. Pulleys.

- 1 40x8x2 7/16 S. S. Pulleys.
- 1 30x12x27/16 S. S. Pulleys.
- 1 26x10x2 7/16 S. S. Pulleys.
- 1 24x10x2 7/16 S. S. Pulleys.
- 2 24x8x2 7/16 S. S. Pulleys.
- 1 20x10x2 7/16 S. S. Pulleys.
- 1 18x8x2 7/16 S. S. Pulleys.
- 1 16x10x2 7/16 S. S. Pulleys.
- 1 8x6x2 7/16 W. S. Pulleys.

Second: That it will upon the execution of this agreement deliver said personal property into the possession of said second party at the City of Seattle aforesaid; and will permit said second party to remove the same to Oregon City, County of Clackamas, and to use the same in the manner and for the purposes for which the same is designed for such time, and so long as the second party shall perform the agreements in this contract set forth.

And said second party agree: First, that they will purchase said personal property from said first party and pay therefor as follows:

2035.54 Dollars upon the execution of this contract. 1073.25 Dollars on the 23d day of September, 1909. 1073.25 Dollars on the 23d day of October, 1909. 1073.25 Dollars on the 23d day of November, 1909. 1073.25 Dollars on the 23d day of December, 1909.

Said several payments to be evidenced by the promissory notes of the said second party which shall in no event be considered as payments until all said notes are actually paid, and each payment hereinabove mentioned is and shall be a condition

precedent to the sale and transfer of the above described property.

Second: That Oregon City Lumber and Manufacturing Co. acknowledge receipt of said personal property at the City of Portland, County of Multnomah, State of Oregon, and agree to cause the same to be transported to said Oregon City at the sole expense, risk and cost of said second party; that they will not use the same for any other purpose than that for which it is designed; that they will not permit the same to be taken out of their possession; nor except with the written consent of said first party remove the same to any other place.

Third: Should any loss, damage or injury result to the said property from any cause, said loss, damage or injury, shall not relieve said second party from their obligation to pay for said property according to the terms of this contract in the same manner as if the same had suffered no loss, damage or injury.

Fourth: Said second party further agree that until they shall have fully performed all the agreements as herein set out they will cause the said property to be insured in an Insurance Company to be designated by the first party in the sum of Five Thousand Six Hundred Dollars, the loss, if any, payable to the said first party.

It is expressly understood and agreed between the parties to this agreement that:

First. The title to the property herein described shall remain in said first party until the full performance of all the conditions herein agreed to be performed and the payment of all the payments herein agreed to be made by said second party, and that upon full payment of said promissory notes, principal and interest, according to the terms, the title to said property shall thereupon vest in said party of the second part.

Second. That in the event the said second party shall fail to make any and all payments herein provided for, when the same shall become due, then all sums heretofore paid by said second party on account of this contract, shall be deemed as rental for the use of said personal property and not as payment on account of the purchase price, and this contract of conditional sale shall be forfeited and determined at the election of the party of the first part: and the said first party may, at its election, immediately take possession of said personal property, using all force necessary to obtain the same, with or without process of law.

Third. That any failure on the part of said first party to take advantage of any breach of this contract shall not be deemed a waiver of its rights to take advantage of any subsequent breach, and default of the party of the second part shall not operate to extinguish or diminish any liability upon the said notes or upon any of them.

155

Witness our hands and seals this day and year hereinabove first written.

	(Seal)
	(Seal)
(	(Seal)
	(Seal)

Endorsed:

Contract between the Pacific Machinery Co.

and

Filed January 4, 1916.

G. H. MARSH, Clerk.

#### DEFENDANT'S EXHIBIT 5.

SPECIFICATIONS OF SAW MILL MACHINERY FOR THE OREGON CITY LUMBER & MFG. Co.

FROM

Pacific Machinery Co. 49 First Street, Portland, Oregon.

All gears, sprocket wheels, couplings, pulleys and friction wheels are to be keyseated and carefully fitted to shafts in the proper location, and furnished with keys, and the shafting is to be properly keyseated for the fitting of the above gears and sprockets.

All sprocket wheels are to be of the heavy web or plate center type sprocket patterns used are to be perfect in pitch, so as not to unduly strain the chain. All shafting is to be turned and ground steel, not cold roll.

The journal bearing boxes furnished are to be of what is termed an extra heavy pattern, having heavy substantial bases, and equipped with a good grade of bearing metal and holding down bolts for caps.

All chain is to be of the healed type, and of the genuine Moline make, which chain is the heaviest and strongest manufactured.

All couplings furnished are to be of a strong, neat design and of a safety pattern, and are to be equipped with turned coupling bolts with Hexigon heads. The couplings are to be both keyed and shrunk, and entire shafts are to be put in lathes so that couplings may be machined after they are put on shaft, in this way making them absolutely true.

All gear wheels and pinions furnished to be of heavy pattern and most carefully designed so as to allow the maximum amount of wear, and duplicates will at all times be carried in stock so as to replace worn gears.

All paper frictions are to be of Rockwood type, being equipped with sleeves and having the loose flange keyed to sleeve. Tarred fibre paper is to be used put together under forty tons hydraulic pressure so as to assure great wearing qualities. Paper fillers for friction will be carried in stock so as to avoid delay and expense in replacing worn frictions.

#### Hog or Edging Grinder.

1 No. 4A Mitts & Merrill Hog or Edging Grinder complete with all regular catalog trimmings.

#### VERTICAL ENGINE.

1 5-H. P. Sterling Vertical Engine complete with all regular trimmings, including Gardner Governor with automatic device for stopping engine in case of breakage of Governor Belt, Governor Pulley, Oil Cups, Throttle Valve, Cylinder Lubricator, Belt Pulley, and Balance Wheel.

#### LATH MILL AND BOLTER.

1 Combination lath mill and bolter with a capacity of 40 to 45 M. Lath machine to be manufactured by Bartlett & Company, Saginaw, Mich., and to be furnished complete ready for operation, including six saws.

#### LATH BINDER AND TRIMMER.

1 Combination lath binder and trimmer complete except saws.

#### PRESCOTT AUTOMATIC UNDERCUT TRIMMER.

1 Prescott 14 Saw Undercut Trimmer complete with all necessary iron work and all necessary wood work and 476 of table chains. The trimmer is to be a self-contained machine operated by locking foot treadles located at either end of table or by hand levers as desired.

Saw ladders are equipped with adjustable

yoke boxes so that as the belts stretch they may be adjusted accordingly.

The main shaft with pulleys is to be  $2\ 3/16$ " in diameter and to be run at a speed of 600 R. P. M.

The Arbor Pulley is to be 16" in diameter and have a 13" face, and the machine is designed for the use of 6" belts but no belts or saws will be furnished.

The head shaft is also to be 2 3/16" in diameter, with boxes, collars, and sprockets, and the tail shaft is to be 1 15/16" in diameter complete with boxes, collars, and sprockets (and the tail shaft is to be 1 15/16" in diameter complete with boxes, collars and sprockets).

The framework is to be made of the most substantial construction, in which 6x6 stock will be used and the table top is to be made of 2x12 stock.

The feed rig is to consist of a heavy 32x4 Spur Gear fitted to a shaft 2 7/16x4′ long, equipped with boxes and collars and drive sprocket.

The intermediate shaft is to be 2 7/16 in diameter by 4' long, to which will be fitted a heavy 32x8 Spur Iron Friction, shaft to be complete with collars and boxes and 8x4 Spur Pinions.

The third shaft of the feed rig is to be 2 7/16x 5' and fitted to it will be 4x8 Spur Paper Friction and an 8x9 Paper Friction and a 24x9 Pulley, and it is to be complete with sliding boxes for throwing boxes in and out.

The trimmer will be arranged to operate at a speed of 80' per minute unless you desire this speed changed and is to be in accordance with cut and description on page 116 of Prescott General Saw Mill Machinery Catalog No. 5.

Blue prints of working drawings of this machine will be furnished to assist in the installation.

#### SLASHER.

1 Heavy Pacific Coast Type Slab Slasher for 7 saws spaced 4' 1" centers.

The Arbor is to be constructed of the best turned and ground steel and is to be  $2\ 15/16$ " in diameter and equipped with seven pairs of heavy coupling collars for slasher saws.

Eight heavy adjustable slasher arbor boxes are to be furnished as well as the necessary collars.

The drive pulley is to be 20" in diameter and for a 16" belt. It is to be of the heavy web center construction, carefully machined both inside and out and perfectly balanced and fitted to Arbor.

Head shaft for operating the floor chains is to be of turned and ground steel 2 7/16" in diameter and 30' long, made in two lengths of 10' and 20' each, and equipped with heavy safety flange coupling both keyed and shrunk into place and equipped with turned coupling bolts. The head shaft is to be keyseated and fitted with 14 heavy web center sprockets for No. 74 healed type chains,

160

having 12 teeth each, and one heavy drive sprocket for No. 82 healed type chain having 26 teeth.

With the Slasher will also be furnished 14 heavy web center sprockets for No. 74 healed type chain, each having 12 teeth and bored for 1 7/16" shaft and keyseated standard. Also 150 lineal feet of \(\frac{1}{4}\)"x3" flat iron with \(\frac{1}{4}\)" screw holes drilled and countersunk on 12" centers.

Included with the machine will be a heavy drive rig, consisting of 36"x6" spur iron friction wheel, fitted to a 2 7/16"x7' 3" shaft, also 10 tooth sprocket wheel for No. 82 healed type chain, fitted to this shaft, and shaft furnished with necessary journal bearings and collars. Second shaft to be 1 15/16"x7' 3" and equipped with 8x7 spur paper friction with necessary lighting boxes and safety set collars.

Our Slasher is a machine designed especially for the Pacific Coast service and one which we have had in operation for a great many years past in some of the largest mills on the Pacific Coast.

#### SECTION 24.

- 1 Shaft 2 15/16"x4' 8" keyseated.
- 1 5-Tooth Expansion Sprocket Wheel for 7/8x6 Long Link Conveyor Chain fitted to above shaft.
- 1 Spur Gear 63 teeth, 1½" pitch, 4" face, bore 2 15/16" keyseated and fitted.
- 1 Shaft 27/16"x5' 3" keyseated.
- 1 Spur pinion 13 teeth,  $1\frac{1}{2}$  pitch, bore 2 7/16 keyseated and fitted.

- 1 36x8x2 7/16" Bevel Iron Friction Wheel, keyseated and fitted.
- 1 Shaft 2 7/16x11' 6" keyseated.
- 1 12x9x2 7/16 Bevel Paper Friction Wheel keyseated and fitted.
- 1 2 7/16"x4' Shaft keyseated.
- 2 20x20 double out end conveyor drums keyseated and fitted.
- 1 Shaft 2 15/16"x4' keyseated.
- 1 20x20 double out end conveyor drum keyseated and fitted.

200' of  $\frac{7}{8}$ x6 genuine eastern made hand, hand welded, tested and warranted, long length conveyor chain, made of double refined iron.

#### Section 29.

- 1 Shaft 1.15/16x4' 6" keyseated.
- 3 15 tooth sprocket wheels for No. 78 riveted chain, keyseated and fitted.

30' of 1/4"x31/2" Flat Iron with 1/4" screw holes.

2 1 15/16 sprocket wheel for No. 78 chain keyseated and fitted.

#### SECTION 26.

- 1 Shaft 1 15/16x7' keyseated.
- 1 Spur paper friction wheel 6"x7"x1 11/16" keyseated and fitted.
- 1 1 15/16" Eccentric Box.
- 1 36x6x2 7/16 Spur Iron Friction Wheel keyseated and fitted.
- 1 10 tooth sprocket wheel for No. 78 riveted chain keyseated and fitted.

1 Shaft 2 7/16"x5' keyseated.

#### SECTION 28.

- 1 Shaft 2 7/16"x3' 6" keyseated.
- 1 9 tooth sprocket wheel for No. 104 chain, bore 2 7/16".
- 1 Bevel gear 55 teeth  $1\frac{1}{4}$ " pitch,  $3\frac{3}{4}$ " face, bore 2.7/16" keyseated and fitted.
- 1 Shaft 1 15/16"x6' keyseated.
- 1 Bevel pinion 14 teeth  $1\frac{1}{4}$ " pitch,  $3\frac{3}{4}$ " face, bore 1 15/16" keyseated and fitted.
- 1 Shaft 1 15/16"x3' keyseated.
- 1 9 tooth sprocket wheel for 104 chain, bore 2 7/16".

#### SECTION 37.

- 1 Shaft 2 7/16x3' keyseated.
- 1 Spur gear 60 teeth 1½" pitch, 3" face, bore 2 7/16" keyseated and fitted.
- 1 9 tooth No. 104 chain sprocket, bore 2 7/16" key-seated and fitted.
- 1 Shaft 1 15/16"x3' 6" keyseated.
- 1 Spur pinion 12 tooth  $1\frac{1}{4}$ " pitch,  $3\frac{1}{4}$ " face, bore 1.15/16" keyseated.
- 1 Shaft 2 7/16"x4' keyseated.
- 1 9-tooth sprocket wheel for No. 104 chain 1 15/16" keyseated and fitted.
- 1 9-tooth sprocket wheel for No. 104 chain, bore 2 7/16" keyseated and fitted.
- 1 Spur gear 60 tooth 11/4" pitch, 3" face, bore 2 7/16" keyseated and fitted.
- 1 Shaft 1 15/16x5' keyseated.

- 1 Spur pinion 15 tooth  $1\frac{1}{4}$ " pitch,  $3\frac{1}{4}$ " face, bore 1 15/16" keyseated.
- 2 9-tooth sprockets for No. 104 chain, bore 1 15/16" keyseated and fitted.

#### SECTION 6.

- 1 Shaft 2 7/16"x4' keyseated.
- 1 9-tooth sprocket wheel for No. 104 chain, bore 2.7/16" keyseated and fitted.
- 1 Spur Gear 60 tooth  $1\frac{1}{4}$ " pitch, face 3", bore 2.7/16" keyseated and fitted.
- 1 Shaft 1 15/16"x4" keyseated.
- 1 Spur Pinion 15 tooth ½" pitch, 3½" face, bore 1 15/16", keyseated and fitted.
- 1 9-tooth sprocket wheel for No. 104 chain, bore 1 15/16" keyseated and fitted.

#### SECTION 36.

- 1 Shaft 1 15/16"x7' 8" keyseated.
- 1 Shaft 2 7/16"x22' 6" keyseated.
- 3 15 tooth No. 78 chain sprockets, bore 2 7/16 key-seated and fitted.
- 1 Spur gear 60-tooth 1½" pitch, 3" face, bore 2 7/16" keyseated and fitted.
- 1 Shaft 2 7/16x7' 8" keyseated.
- 1 Spur Pinion 15 tooth  $1\frac{1}{4}$  pitch,  $3\frac{1}{2}$  face, bore 2.7/16 keyseated and fitted.
- 1  $24x6x1 \ 15/16$ " Spur Iron Friction keyseated and fitted.
- 1 16x6x1 15/16" Phillips Steel Pressed Pulley.
- 1 1 15/16" Eccentric Box.

- 164 F. T. Meyer vs. Pacific Machinery Co.
- 1 8x7x1 15/16 Spur Paper Friction keyseated and fitted.

#### SECTION 40.

- 1 80' of 2 15/16" shaft in four lengths coupled together with three pair of 2 15/16" safety flange couplings.
- 2 Shafts 2 7/16"x20' coupled together with one pair of 2 7/16" safety flange couplings, and coupled to above length of 2 15/16" shaft with 2 15/16x 2 7/16 reducing safety flange coupling.
- 1 36" sprocket wheel for No. 124 chain keyseated and fitted.
- 3 Bevel Pinions 14 tooth  $1\frac{1}{4}$ " pitch,  $3\frac{3}{4}$ " face, bore 2 7/16" keyseated and fitted.
- $3~{\rm Shafts}~2~7/16"{\rm x}5'~{\rm keyseated}.$
- 3 Bevel gears 55 teeth,  $1\frac{1}{4}$ " pitch,  $3\frac{3}{4}$ " face, bore 2 7/16" keyseated and fitted.
- 3 Shafts 1 15/16"x16' keyseated.
- 6 12-tooth sprocket wheels for No. 74 chain, bore 2.7/16" keyseated and fitted.
- 3 12-tooth sprocket wheel for No. 74 chain, bore 2.7/16" keyseated and fitted.
- 1 12-tooth sprocket wheel for No. 78 chain, bore 1 15/16" keyseated and fitted.
- 3 12-tooth sprocket wheels for No. 78 chain, bore 1.7/16" keyseated and fitted.

#### SECTION 18.

- 1 Shaft 2 7/16"x7' 6" keyseated.
- 1 36"x8"x2 7/16" spur iron friction wheel keyseated and fitted.

- 1 12-tooth sprocket wheel for No. 124 chain, bore 2.7/16" keyseated and fitted.
- 1 Shaft 2 7/16"x8' keyseated.
- 1 12x9x2 7/16" spur paper friction, keyseated and fitted.

#### WOOD SAW.

1 Pacific Coast Standard Wood Saw Machine, for cutting 4' slabs into 16" lengths. Machine is to be in accordance with blue print from working drawing attached hereto.

The arbor is to be made of the best of turned and ground steel and is to be a 2 15/16" in diameter and 8' 11" long, made in three sections, and equipped with two pairs of heavy coupling collars, shrunk onto arbor and then carefully turned up, so as to be in perfect balance. The arbor is to be furnished with three heavy 2 15/16" post boxes and two safety set collars. The arbor pulley is to be 24" in diameter and for a 10" belt, and is to be of the heavy web center construction, carefully machined on both inside and outside, and accurately balanced.

There is also to be a 10"x6" C. I. D. B. Pulley for operating drive rig.

The head shaft is to be 1 15/16" in diameter and 8' 2" in length and equipped with six 11-tooth No. 74 chain sprockets and one 30-tooth No. 74 chain drive sprocket. With the head shaft will be furnished three 1 15/16" Post Boxes.

The tail shaft is to be 1 7/16" in diameter and 4' 5" in length and equipped with one 11-tooth No. 74 chain sprocket keyed and fitted, and five 11-tooth

No. 74 chain sprockets set screwed so as to allow for uneven wear of chain. Tail shaft is to be provided with four 1 7/16"x13/4" sliding boxes, each faced on one end, and eight 1 7/16" Safety Set Collars.

With the iron works will be furnished 34 of ½x1½" rolled iron drilled and countersunk.

The drive rig is to consist of one shaft 1 15/16"x 4' keyseated and equipped with one 30x6x1 15/16" Spur Iron Friction Wheel, and a 11-tooth No. 78 Chain Drive Sprocket and two 1 15/16" Plain Journal Bearing Boxes.

One shaft 1"x4' keyseated and equipped with one 30x6x1 C. I. Pulley, one 6x7x1 7/16" Spur Paper Friction Wheel and furnished with 1 15/16" Sliding Box, one 1 15/16" journal bearing box and one 1 15/16" Safety Set Collar.

Wood Saw Machinery is to be of our standard type, which has been in successful operation for many years in Pacific Coast Service. With the machine will be furnished 80' of No. 74 Riveted Chain and 7' of No. 74 "A" attachment.

#### CHAIN.

200' of No. 78 Chain.

180' of No. 104 & C Chain.

320' of No. 104 and C Chain.

40' of No. 124 Chain.

900' of No. 74 Chain.

90' of No. 78 Chain (Sec. 24).

90' of No. 104 and C Chain (Sec. 37).

300' of No. 74 Chain with "N" attachment every third link (Slasher).

25' of No. 82 Riveted Chain.

Filed January 4, 1916.

G. H. MARSH, Clerk.

#### DEFENDANT'S EXHIBIT 6.

Sheet No. A297.

Order No.

Shipped via

Pacific Machinery Co. 49 First Street.

Manufacturers and Dealers in Machinery and Mill Supplies.

SOLD TO

Oregon City Lbr. & Mfg. Co., Oregon City, Ore.

Portland, Ore., June 10-09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

10	2 7/16 flat	t boxes		 											\$23.00
4	$2 \ 15/16$	do	,	 	 ٠			a	 ٠, ٠	۰			0		13.00
22	27/16 set	collars				٠	 ۰	۰		0	۰	۰			. 15.84
	Draying.				 ٠					۰					25

Sheet No. A302. Order No.

Shipped via

Pacific Machinery Co.,
49 First Street.

Manufacturers and Dealers in
Machinery and Mill Supplies.

SOLD TO

Oregon City Lbr. & Mfg. Co., Oregon City, Ore.

Portland, Ore., June 15-09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

5′ 1 15/16 wood pulley bushing at 12c......\$ .60

Sheet No. A312. Order No. Mr. Johnson. Shipped via

Pacific Machinery Co.,
49 First Street.

Manufacturers and Dealers in
Machinery and Mill Supplies.

SOLD TO

Oregon City Lbr. & Mfg. Co., Oregon City, Ore.

Portland, Ore., June 24-09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

F. T. Meyer vs. Pacific Machinery Co.	169
1 Shaft 1 15/16x20′ 206# at 3.50\$	7.21
1 " 1 15/16x11' 114# at 3.85+40c cutting	
off	4.79
_	
*	12.00

Sheet No. A317. Order No. P. S. M. D. 839. Shipped via

Pacific Machinery Co.,
49 First Street.
Manufacturers and Dealers in
Machinery and Mill Supplies.

SOLD TO

Oregon Lbr. & Mfg. Co., Oregon City, Ore.

Portland, Ore., June 24-09.

Terms: No goods to be returned without	first
getting permission. Claims for shortage mus	t be
made within ten days from date of invoice.	
180′ #78 riveted chain\$6	30.75
90 Attachments B for above 1	1.51
20′ #87 riv chain	1.75
5 Sheets red friction paper 51 lbs. at 12c	6.12

170 F. T. Meyer vs. Pacific Machinery Co.

Sheet No. A305. Order No. P. S. M. D. 200. Shipped via

> Pacific Machinery Co., 49 First Street.

Manufacturers and Dealers in Machinery and Mill Supplies.

SOLD TO

Oregon City Lbr. & Mfg. Co., Oregon City, Ore.

Terms: No goods to be returned without first

Portland, Ore., June 25-09.

getting permission. Claims for shortage must be made within ten days from date of invoice. 1 16x6x3 15/16 W. S. Pulley.....\$ 2.60 1 14x8x3 15/16 2.72 do 2.32 1 12x8x3 15/16 do . . . . . . . . . . . . . . . . 1 8x6x3 15/16 do 1.48 . . . . . . . . . . . . . . . 1 12x8x2 15/16 S. S. Pulley..... 3.12 2 10x6x2 15/16 do 5.02 . . . . . . . . . . . . . . . . 1 40x8x2 7/16 15.39 do . . . . . . . . . . . . . . . . 1 30x12x2 7/16 do 13.37. . . . . . . . . . . . . . . . . . . 9.24 1 26x10x2 7/16 do . . . . . . . . . . . . . . . . 1 24x10x2 7/16 8.47 do . . . . . . . . . . . . . . . . 2 24x8x2 7/16 . . . . . . . . . . . . . . . 14.26 do 1 20x10x2 7/16 do 6.48 . . . . . . . . . . . . . . . . 1 18x8x2 7/16 do 5.02 . . . . . . . . . . . . . . . .

6.58

Sheet No. A322.

Order No. P. S. M. D. 999.

Shipped via

Pacific Machinery Co., 49 First Street.

Manufacturers and Dealers in Machinery and Mill Supplies.

SOLD TO

Oregon City Lbr. & Mfg. Co., Oregon City, Ore.

Portland, Ore., July 2, '09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

2	2 7/16 set collars\$	1.80
4'	2 7/16 W. P. Bushing	.48
1	Shaft 1 15/16x7′ 3″ K. S	4.06

\$6.34

Sheet No. A341. Order No. Shipped via

> Pacific Machinery Co., 49 First Street.

Manufacturers and Dealers in Machinery and Mill Supplies.

SOLD TO

Oregon City Lbr. & Mfg. Co., Oregon City, Ore.

Portland, Ore., July 13-09.

Terms: No goods to be returned without first

# 172 F. T. Meyer vs. Pacific Machinery Co.

getting permission. Claims for shortage must be made within ten days from date of invoice.

1	32x8 Phillips' steel split pulley\$10.45
1	Box — 55 lbs. Sterling Babbitt at 25c 13.75
$10^{'}$	#74 Chain—"N" attachments every other
	link 2.84

\$27.04

Sheet No. A346. Order No. Mr. Keller. Shipped via

Pacific Machinery Co.,
49 First Street.

Manufacturers and Dealers in
Machinery and Mill Supplies.

SOLD TO

Oregon City Lbr. & Mfg. Co., Oregon City, Ore.

Portland, Ore., July 17-09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

1	*)	15/16	flat box	bal	obitted				٠	\$	5.75
12	1	15/16	Safety	set	collars						8.40
6	2	7/16		do							5.40

Sheet No. A357. Order No. Mr. Keller. Shipped via

Pacific Machinery Co.,
49 First Street.
Manufacturers and Dealers in
Machinery and Mill Supplies.

SOLD TO

Oregon City Lbr. & Mfg. Co., Oregon City, Ore.

Portland, Ore., July 22-09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

1 14x6 steel split pulley—Phillips'......\$3.32

Sheet No. A362. Order No. Mr. Keller. Shipped via

Pacific Machinery Co.,
49 First Street.

Manufacturers and Dealers in
Machinery and Mill Supplies.

SOLD TO

Oregon City Lbr. & Mfg. Co., Oregon City, Ore.

Portland, Ore., July 29-09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

# 174 F. T. Meyer vs. Pacific Machinery Co.

2	16x4x1	15/16	Phillip	s steel	pulleys	\$6.21
1	10x4x1	15/16		do		2.19
1	6x3x1	15/16	wood j	pulley		1.16
						\$9.56

Sheet No. A370. Order No. Mr. Nickerson.

Shipped via

Pacific Machinery Co., 49 First Street.

Manufacturers and Dealers in Machinery and Mill Supplies.

SOLD TO

Oregon City Lumber & Mfg. Co., Oregon City, Ore.

Portland, Ore., Aug. 6-09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

8	1	7/16 set collars\$	4.00
10	1	7/16 solid boxes at 80c	8.00
6	1	15/16 flat boxes	9.30

\$21.30

Sheet No. A411. Order No. 4141. Shipped via Pacific Machinery Co.,
49 First Street.

Manufacturers and Dealers in
Machinery and Mill Supplies.

Oregon City Lumber & Mfg. Co., Oregon City, Ore.

SOLD TO

Portland, Ore., 8-31-09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

5	$2\ 7/16$	flat boxes	 				٠	۰				 .\$11.50
1	27/16	eccentric box								٠		 . 7.25

\$18.75

Sheet No. A356. Order No. 2148. Shipped via

Pacific Machinery Co.,
49 First Street.

Manufacturers and Dealers in
Machinery and Mill Supplies.

SOLD TO

Oregon City Lumber & Mfg. Co., Oregon City, Ore.

Portland, Ore., 9-9-09.

Terms: No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice.

1 6x7½—10 1 P Sterling Vertical Engine with Reg. Trimming's Exchange for 4x5
Engine which will be returned to Seattle freight paid. 10 H. P. Engine is to be F.O.B. Seattle, 4x5 Engine to be new....\$45.00
Filed January 4, 1916.

G. H. MARSH, Clerk.

## DEFENDANT'S EXHIBIT 8.

KNOW ALL MEN BY THESE PRESENTS, That the Oregon City Lumber & Manufacturing Company, a corporation, party of the first part, for and in consideration of the payment of the sum of One Dollar (\$1.00), and other good and valuable considerations, do hereby bargain, sell, transfer, and deliver unto John J. Cooke and J. W. Moffatt, parties of the second part, the following described property, namely: That certain indenture of lease from the Crown Columbia Pulp & Paper Company to the party of the first part, to certain real estate situated in the Northerly part of Oregon City, Clackamas County, Oregon; also that certain mill property, including all buildings and machinery, situate on the property so leased by the party of the first part, together with all stock on hand and all other assets of whatsoever name and nature now owned by the party of the first part wherever situate in its possession or to which it is entitled in law or equity.

TO HAVE AND TO HOLD the same unto the

parties of the second part, their assigns and personal representatives forever, IN TRUST, nevertheless, for the uses and purposes following:

First: To make an inventory of said assets.

Second: To insure the same.

Third: To sell and dispose of said property by retail sales or in bulk as they may deem best.

Fourth: To operate the said mills as they may deem best and to defray the actual and necessary expenses in so doing.

Fifth: To defray the actual and necessary expenses in carrying out the provisions of this trust.

Sixth: To pay all liens and preferred claims against the party of the first part as well as all liens upon the property belonging to it.

Seventh: To pay all creditors in full, if sufficient funds be realized for that purpose, and if not, then to pay the same pro rata in accordance with the amount of their respective claims and demands.

Eighth: To return the surplus, if any, to the party of the first part.

IN WITNESS WHEREOF the party of the first part has signed this document pursuant to the order of the directors heretofore made and entered and set its seal this 28th day of October, 1909.

# OREGON CITY LUMBER & MANUFACTURING COMPANY,

By W. G. Bohn, President. By C. S. Keller, Secretary.

(Corporate seal)

178 F. T. Meyer vs. Pacific Machinery Co.

In the presence of:

C. D. Latourette,

W. A. Dimick.

Endorsed: Trust Deed, Oregon City L. & Mfg. Co. to John J. Cooke and J. W. Moffit.

STATE OF OREGON,
County of Clackamas.

I, C. E. Ramsby, County Recorder, in and for said county, do hereby certify that the within instrument of writing was received for record at 8 o'clock a. m. on the 29th day of Oct., 1909, and recorded on page 205 in Book 3 Record of Miscel. of said county and state.

Witness my hand and seal of office affixed.
(Seal County Recorder) C. E. RAMSBY,

Recorder.

Filed Nov. 10, 1909.

F. W. GREENMAN, Clerk. By W. L. Mulvey, Deputy.

Filed January 4, 1916.

G. H. MARSH, Clerk.

DEFENDANT'S EXHIBIT, JUDGMENT ROLL No. 5205.

In the Circuit Court of the United States for the District of Oregon.

OCTOBER TERM, 1911.

Be it remembered, That on the 28th day of Sep-

tember, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill in Equity, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

No. ---

IN EQUITY.

THE PACIFIC MACHINERY COMPANY, a corporation,

Plaintiff,

v.

THE OREGON CITY LUMBER AND MANUFACTURING COMPANY, a corporation, JOHN W. MOFFITT, and JOHN J. COOKE, as assignees of The Oregon City Lumber and Manufacturing Company, and F. T. MEYER,

Defendants.

To the Honorable Judge of the Circuit Court of the United States for the District of Oregon:

The Pacific Machinery Company, a corporation created by, and organized under and by virtue of the laws of the State of Washington, and a citizen and resident thereof, having its office and principal place of business at Seattle, Washington, brings this its bill against the Oregon City Lumber and Manufacturing Company, a corporation created by and existing under and by virtue of the laws of the State of Oregon, and a citizen of Oregon, residing

at Oregon City, Oregon; John W. Moffitt, a resident of Oregon City, Oregon, and a citizen of the State of Oregon; John J. Cooke, a resident of Oregon City, Oregon, and a citizen of the State of Oregon; and F. T. Meyer, a resident of Oregon City, Oregon, and a citizen of the State of Oregon, and thereupon your orator complains and says:

#### T.

That on or about April 29, 1909, the said complainant offered to sell to the Oregon City Lumber and Manufacturing Company, a certain bill of machinery, a list of which, marked Exhibit A, is attached to this bill and made a part thereof, for the sum of \$4695.00, terms to be \$1500 cash, balance to be paid in equal installments of three, four, and five months, dating from shipment of machinery, notes to be given for deferred payments bearing interest at 8%, transaction to be secured by conditional sale contracts.

## II.

That said offer was accepted in terms as aforesaid by the Oregon City Lumber and Manufacturing Company and that said machinery was delivered to the said Oregon City Lumber and Manufacturing Company by your complainant herein.

## HI.

That notwithstanding the promises and undertakings of the said Oregon City Lumber and Manufacturing Company, as above set forth, the said Oregon City Lumber and Manufacturing Company have never complied with the conditions of their contract, in that they have not paid the sum of \$1500, nor executed the conditional sale contracts as aforesaid, though demand that they so do was and has often been made upon the said company.

#### IV.

That on account and by reason of the above facts your complainant has during all the times herein mentioned claimed an equitable lien upon the said property.

## V.

That on or about November 10, 1909, the said Oregon City Lumber and Manufacturing Company made an assignment for the benefit of the creditors to John J. Cooke and John W. Moffitt.

# VI.

That said defendants John J. Cooke and John W. Moffitt, as assignees of the Oregon City Lumber and Manufacturing Company on the 20th of April, 1911, assumed to sell all the property of the said company, including the property scheduled in Exhibit A, at an assignee sale in Oregon City, though well knowing the claim of the complainant to the property listed in Exhibit A hereto attached.

# VII.

That said property was declared sold to the defendant F. T. Meyer, who was informed and had

notice that the complainant claimed an equitable lien thereon.

#### VIII.

That the said F. T. Meyer refuses to deliver the said property to this complainant or to render an account thereof.

#### IX.

That the said property is reasonably worth greatly in excess of \$2000.00.

WHEREFORE, plaintiff prays that this honorable court decree that the defendant F. T. Meyer holds the said property as trustee for this defendant, and that the defendants Oregon City Lumber and Manufacturing Company, and John J. Cooke and John W. Moffitt have no further interest therein; and that this honorable court grant the complainant such other and further relief as may seem meet; and

This complainant further prays that a subpoena may issue to the defendants, Oregon City Lumber and Manufacturing Company, John J. Cooke, John W. Moffitt, and F. T. Meyer, requiring them to appear and answer the allegations of this bill, but not under oath, the oath being waived.

> IRA BRONSON, Counsel for Plaintiff.

STATE OF WASHINGTON, County of King.

E. I. Garrett, being first duly sworn, on oath deposes and says: that he is the treasurer of the

Pacific Machinery Company, plaintiff in the above entitled action; that he has read the foregoing bill of complaint, knows the contents thereof and believes the same to be true.

E. I. GARRETT.

Subscribed and sworn to before me this 21st day of September, 1911.

(Seal)

IRA BRONSON,

Notary Public in and for the State of Washington residing at Seattle.

## EXHIBIT A.

- 1 11x14 Beck Type Engine Feed.
- 1 No. 4A Mitts & Merrill Hog or Edging Grinder complete.
- 1 5 H. P. Sterling Vertical Engine complete with all regular trimmings.
- 1 Combination lath mill and bolter with a capacity of 40 to 45 M. Bartlett & Company. Including six saws.
- 1 Combination lath binder and trimmer complete except saws.
- 1 Prescott 14 Saw Undercut Trimmer complete with all necessary iron work and all necessary wood work and 476' of table chains.
- 1 Heavy Pacific Coast Type Slab Slasher for 7 saws spaced 4' 1" centers. Including heavy drive rig.
- 1 Shaft 2 15/16x4' 8" keyseated.
- 1 5 Tooth Expansion Sprocket Wheel for 7/8x6 Long Length Conveyor Chain fitted to above shaft.

- 1 Spur Gear 63 teeth,  $1\frac{1}{2}$  pitch, 4 face, bore 2.15/16 keyseated and fitted.
- 1 Shaft 2 7/16"x5' 3" keyseated.
- 1 Spur Pinion 13 teeth, 1½" pitch, bore 2 7/16" keyseated and fitted.
- 1 36x8x2 7/16" Bevel Iron Friction Wheel keyseated and fitted.
- 1 Shaft 2 7/16x11' 6" keyseated and fitted.
- 1 12x9x2 7/16" Bevel Paper Friction Wheel keyseated and fitted.
- 1 2 7/16"x4'.
- 2 20x20 double out end conveyor drum keyseated and fitted.
  - 200' of 7/sx6 genuine eastern made hand, hand welded, tested and warranted, long length conveyor chain, made of double refined iron.
- 1 Shaft 1.15/16x4' 6" keyseated.
- 3 15 Tooth Sprocket Wheels for No. 78 Riveted Chain, keyseated and fitted.
  30' of ½"x3½" Flat Iron with ½" screw holes.
- 2 Sprockets 15 tooth No. 78 fitted—2 shaft 1 7/16x12".
- 1 Shaft 1 15/16x7' keyseated and fitted.
- 1 Spur Paper Friction Wheel 6"x7"x15/16" keyseated and fitted.
- 1 Shaft 2 7/16"x22' 6" keyseated.
- 3 15 tooth No. 78 chain sprockets, bore 2 7/16" key-seated and fitted.
- 1 Spur gear 60 tooth, 1½" pitch, 3" face, bore 2 7/16" keyseated and fitted.
- 1 Shaft 27/16x7' 8" keyseated.

- 1 Spur Pinion 15 tooth,  $1\frac{1}{4}$ " pitch,  $3\frac{1}{2}$ " face, bore 2 7/16 keyseated and fitted.
- 1 24x6x1 15/16" Spur Iron Friction Wheel keyseated and fitted.
- 1 Shaft 1 15/16x7' 8" keyseated.
- 1 8x7x1 15/16" Spur Paper Friction keyseated and fitted.
- 1 16x6x1 15/16" Phillips Steel Pressed Pulley keyseated and fitted.
- 1 1 15/16" Eccentric Box.
- 1 80' of 2 15/16" shaft in four lengths coupled together with three pair of 2 15/16" safety flange couplings.
- 2 Shafts 2 7/16"x20' coupled together with one pair of 2 7/16 safety flange couplings, and coupled to above length of 2 15/16" shaft with 1 15/16"x 2' 7/16 reducing safety flange coupling.
- 1 36" sprocket wheel for No. 124 chain keyseated and fitted.
- 3 Bevel pinions, 14 tooth,  $1\frac{1}{4}$ " pitch,  $3\frac{3}{4}$ " face, bore 2 7/16" keyseated and fitted.
- 3 Shafts 2 7/16"x5' keyseated.
- 3 Bevel Gears, 55 teeth,  $1\frac{1}{4}$ " pitch,  $3\frac{3}{4}$ " face, bore 2 7/16 keyseated and fitted.
- 3 Shafts 1 15/16x16' keyseated.
- 6 12 tooth sprocket wheels for No. 74, bore 1 15/16. Keyseated and fitted.
- 3 12 tooth sprocket wheels for No. 74 chain, bore 1 15/16" keyseated and fitted.
- 1 12 tooth sprocket wheel for No. 78 chain, bore 1 15/16" keyseated and fitted.

- 3 12 tooth sprocket wheels for No. 78 chains, bore 1 7/16, keyseated.
- 1 Shaft 2 7/16"x7' 6" keyseated.
- 1 36"x8"x2 7/16" spur iron friction wheel keyseated and fitted.
- 1 12 tooth sprocket wheel for No. 124 chain, bore 2 7/16" keyseated and fitted.
- 1 10 Tooth Sprocket Wheel for No. 78 Riveted Chain keyseated and fitted.
- 1 Shaft 2 7/16" 5' keyseated.
  - 1 1 15/16" Eccentric Box.
  - 1 36x6x2 7/16 Spur Iron Friction Wheel keyseated and fitted.
  - 1 Shaft 2 7/16"x3' 6" keyseated.
  - 1 9 Tooth Sprocket Wheel for No. 104 Chain, bore 2 7/16".
  - 1 Bevel Gear 55 Teeth,  $1\frac{1}{4}$ " pitch,  $3\frac{3}{4}$  face, bore 2 7/16 keyseated and fitted.
  - 1 Shaft 1 15/16"x6' keyseated.
  - 1 Bevel Pinion 14 teeth, 1½" pitch, 3¾" face, bore 1 15/16" keyseated and fitted.
  - 1 Shaft 1 15/16x3'.
  - 1 9 Tooth Sprocket Wheel for No. 104 chain, bore 1 15/16", keyseated and fitted.
  - 1 Shaft 2 7/16"x4' keyseated.
  - 1 9 tooth sprocket wheel for No. 104 chain, bore 2 7/16" keyseated and fitted.
  - 1 Spur Gear 60 tooth,  $1\frac{1}{4}$ " pitch,  $3\frac{1}{4}$  face, bore 1 15/16" keyseated and fitted.
  - 1 Spur Pinion 15 tooth, 1½" pitch, 2" face, bore 1 15/15" pitch keyseated and fitted.

- 1 Shaft 1 15/16"x5' keyseated.
- 2 9 tooth sprockets for No. 104 chain, bore 1 15/16" keyseated and fitted.
- 1 Shaft 2 7/16"x4' keyseated.
- 1 9 tooth sprocket wheel for No. 104 chain, bore 27/16, keyseated and fitted.
- 1 Spur gear 60 tooth, 11/4" pitch, 3" face, bore 2 7/16" keyseated and fitted.
- 1 Shaft 1 15/16"x4' keyseated.
- 1 Spur Pinion 15 tooth, 11/4" pitch, 31/4" face, bore 1 15/16, keyseated and fitted.
- 1 9 tooth sprocket wheel for No. 104 chain, bore 1 15/16" keyseated and fitted.
- 1 Shaft 2 7/16x8' keyseated.
- 1 12x9x2 7/16" spur paper friction, keyseated and fitted.
- 1 Pacific Coast Standard Wood Saw Machine, for cutting 4' slabs into 16" lengths.

200' of No. 78 Chain.

180' of No. 104 and C. Chain.

320' of No. 104 and C. Chain,

40' of No. 124 Chain.

. 900' of No. 74 Chain.

90' of No. 78 Chain (Sec. 24).

90' of No. 104 and C. Chain (Sec. 37).

300' of No. 74 Chain with "n" attachment every third link (Slasher).

25' of No. 82 Riveted Chain.

- 1 Shaft 2 7/16x28 keyseat.
- 1 Spur Gear 24x3 keyseat and fit.

- 1 9 Tooth No. 104 Sprocket, bore 2 & 7/16 keyseat and fit.
- 1 Shaft 1 15/16x3' 6".
- 1 Spur Pinion 12 Tooth,  $1\frac{1}{4}$  pitch,  $3\frac{1}{4}$  face, keyseat and fit.
- 1 Sprocket 9 tooth No. 104, bore 1 15/16.

Filed September 28, 1911.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 28th day of September, 1911, there was duly filed in said Court, Praecipe for Subpoena, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

No. —

THE PACIFIC MACHINERY COMPANY, a corporation,

Plaintiff,

v.

THE OREGON CITY LUMBER AND MANUFACTURING COMPANY, a corporation, JOHN W. MOFFITT, and JOHN J. COOKE, as assignees of The Oregon City Lumber and Manufacturing Company, and F. T. MEYER.

Defendants.

To the Clerk of the Circuit Court of the United States, for the District of Oregon:

You are hereby requested to issue a subpoena

in the above entitled action, and to direct service upon The Oregon City Lumber and Manufacturing Company at Oregon City, Oregon.

> IRA BRONSON, Counsel for Plaintiff.

189

Filed, September 28, 1911.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 30th day of October, 1911, there was issued out of said Court a Subpoena ad Respondendum in words and figures as follows, to-wit:

RETURN ON SERVICE OF WRIT.

UNITED STATES OF AMERICA, District of Oregon. ss.

I hereby certify and return that I served the annexed Subpoena ad Respondendum on the thereinnamed F. T. Meyer by handing to and leaving a true and correct copy thereof together with the copy of the Bill in Equity with him personally at Oregon City in said district on the 26th day of October, A. D. 1911.

LESLIE M. SCOTT, U. S. Marshal. By J. B. Marvin, Deputy.

# RETURN ON SERVICE OF WRIT.

UNITED STATES OF AMERICA, Ss. District of Oregon.

I hereby certify and return that I served the annexed Subpoena ad Respondendum on the thereinnamed The Oregon City Lumber & Manufacturing Company, a corp., by handing to and leaving a true and correct copy of the Subpoena ad Respondendum, together with the copy of the Complaint thereof, with George W. Bohn as President of said Company Corporation personally at Portland in said district on the 13th day of October, A. D. 1911.

LESLIE M. SCOTT,

U. S. Marshal.

By Leonard Becker, Deputy.

In the Circuit Court of the United States for the District of Oregon.

No. 3843.

IN EQUITY—SUBPOENA AD RESPONDENDUM.

THE PACIFIC MACHINERY COMPANY, a corporation,

Complainant,

VS.

THE OREGON CITY LUMBER AND MANUFACTURING COMPANY, a corporation, JOHN W. MOFFITT, and JOHN J. COOKE, as assignees of The Oregon City Lumber and Manufacturing Company, and F. T. MEYER.

Defendants.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To The Oregon City Lumber and Manufacturing Company, a corporation, John W. Moffitt, and John J. Cooke, as assignees of The Oregon City Lumber and Manufacturing Company, and F. T. Meyer, Greeting:

You, and each of you, are hereby commanded that you be and appear in said Circuit Court of the United States, at the Court room thereof, in the City of Portland, in said District, on the first Monday of November next, which will be the sixth day of November, A. D. 1911, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein The Pacific Machinery Company, a corporation, is complainant, and you are defendants, and further to do and receive what our said Circuit Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the Marshal of said district, or your deputy, to make due service of this our writ of subpoena and to have then and there the same.

Hereof fail not.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 28th day of September, in the year of our Lord, One Thousand Nine Hundred and Eleven, and of the Independence of the United States, the One Hundred and Thirty-sixth.

(Seal) G. H. MARSH, Clerk.
By J. W. Marsh, Deputy Clerk.

MEMORANDUM pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The defendant is to enter his appearance in the above entitled suit in the office of the Clerk of said Court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken pro confesso.

Returned and filed October 30, 1911.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 6th day of November, 1911, there was duly filed in said Court, praccipe for appearance of defendants in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

No. 3843.

THE PACIFIC MACHINERY COMPANY, a corporation,

Complainant,

V.

THE OREGON CITY LUMBER AND MANUFAC-TURING COMPANY, a corporation, JOHN W. MOFFITT, and JOHN J. COOKE, as assignees of The Oregon City Lumber and Manufacturing Company, and F. T. MEYER,

Defendants.

To the Clerk of the above entitled Court:

You will please enter my appearance as Solicitor in the above entitled cause for the defendants and each of them.

C. D. & D. C. LATOURETTE, DOLPH, MALLORY, SIMON & GEARIN.

Filed, November 6, 1911.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Friday, the 7th day of December, 1911, the same being the 57th Judicial Day of the regular October, 1911, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

In the Circuit Court of the United States for the District of Oregon.

No. 3843.

December 7, 1911.

PACIFIC MACHINERY COMPANY,

v.

OREGON CITY LUMBER & MANUFACTURING COMPANY, et al.

Now, at this day, on motion of Mr. John M.

Gearin, of counsel for the defendants in the above entitled cause, it is ordered that said defendants be, and they are hereby allowed ten days from this date in which to plead to the bill of complaint herein.

And afterwards, to-wit, on the 14th day of December, 1911, there was duly filed in said Court, Demurrer in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

THE PACIFIC MACHINERY COMPANY, a corporation,

Plaintiff,

v.

THE OREGON CITY LUMBER AND MANUFACTURING COMPANY, a corporation, JOHN W. MOFFITT and JOHN J. COOKE, as assignees of The Oregon City Lumber and Manufacturing Company, and F. T. MEYER,

Defendants.

Demurrer of the defendants Oregon City Lumber and Manufacturing Company, John W. Moffitt, and John J. Cooke, assignees of the Oregon City Lumber and Manufacturing Company, and F. T. Meyer.

These defendants by protestation not confessing all or any of the matters and things in the Plaintiff's Bill of Complaint contained to be true in such manner and form as the same is therein set forth and alleged, do demur to said Bill and for cause of demurrer show:

I.

That said Bill doth not contain any matter of equity whereon this Court can ground any decree or give to the plaintiff any relief against these defendants, or either of them.

WHEREFORE, and for divers other good causes of demurrer appearing in the Bill, defendants doth demur thereto and humbly demand the judgment of this Court whether they shall be compelled to make any further or other answer to the said Bill and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

JOHN J. COOKE.

STATE OF OREGON,
County of Multnomah.

John J. Cooke makes solemn oath and says: that the foregoing demurrer is not interposed for delay. JOHN J. COOKE.

Subscribed and sworn to before me this 12th day of December, A. D. 1911.

(Notarial seal)

C. D. LATOURETTE,

Notary Public for Oregon.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

> JNO. M. GEARIN, Attorney for Defendants.

Copy of the within demurrer left at my office for plaintiff this 14th day of December, 1911.

G. H. MARSH, Clerk.

Above copy mailed to Ira Bronson, attorney for plaintiff, addressed to Colman Building, Seattle, Wash., this December 14, 1911.

G. H. MARSH, Clerk.

Filed, December 14, 1911.

G. H. MARSH, Clerk.

In the District Court of the United States for the District of Oregon.

And afterwards, to-wit, on Monday, the 27th day of May, 1912, the same being the 73d Judicial Day of the regular March, 1912, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

In the District Court of the United States for the District of Oregon.

ORDER.

THE PACIFIC MACHINERY COMPANY, a corporation,

Plaintiff,

V.

THE OREGON CITY LUMBER AND MANUFACTURING COMPANY, a corporation, JOHN W.

MOFFITT and JOHN J. COOKE as assignees of The Oregon City Lumber and Manufacturing Company, and F. T. Meyer,

Defendants.

At this time this matter coming on to be heard upon the demurrer filed herein by defendants, plaintiff appearing by Ira Bronson, its attorney, and defendants appearing by Dolph, Mallory, Simon & Gearin, their attorneys, whereupon the said demurrer is argued and submitted, and the Court being fully advised in the premises, sustains said demurrer.

And plaintiff, by its attorney, in open Court declining to plead further,

It is ordered, considered, adjudged, and decreed that plaintiff's bill be dismissed and that defendants have and recover judgment against plaintiff for their costs and disbursements herein taxed at \$21.00.

CHAS. E. WOLVERTON, Judge.

Filed, May 27, 1912.

A. M. CANNON, Clerk.

And afterwards, to-wit, on the 28th day of May, 1912, there was duly filed in said Court, Cost Bill in words and figures as follows, to-wit:

In the District Court of the United States for the District of Oregon.

No. ---

## THE PACIFIC MACHINERY CO.

VS.

# THE OREGON CITY LUMBER CO., et al.

Total taxed at ......\$21.00

A. M. CANNON, Clerk.

By F. H. Drake, Deputy.

No. 3843.

In the District Court of the United States for the District of Oregon.

THE PACIFIC MACHINERY CO.

VS.

THE OREGON CITY LUMBER CO., et al. COST BILL.

Filed May 28, 1912.

A. M. CANNON, Clerk.

# DISTRICT OF OREGON, ss.

I, Jno. M. Gearin, being duly sworn, on my oath say that I am one of the attorneys for the defend-

ants in the above entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said defendants are entitled to recover the same from the plaintiff as I verily believe.

JNO. M. GEARIN.

Subscribed and sworn to before me this May 28, 1912.

A. M. CANNON, U. S. Comm'r.

UNITED STATES OF AMERICA, District of Oregon.

I, A. M. Cannon, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing and attached papers constitute the Judgment Roll in Cause No. 3843, Pacific Machinery Co. vs. Oregon City Lumber Co., et al., and that the copies of Journal entries herein are true copies of the same and of the whole thereof.

In testimony whereof I have hereunto set my hand this 14th day of June, A. D. 1912.

A. M. CANNON, Clerk. By F. H. Drake, Deputy Clerk.

Judgment Roll filed June 14, 1912.

A. M. CANNON, Clerk.

And afterwards, to-wit, on the 14th day of November, 1916, there was duly filed in said Court and

cause, a Petition for Writ of Error, in words and figures as follows, to-wit:

# PETITION FOR WRIT OF ERROR.

Now comes F. T. Mever, defendant herein, and says that on or about the 16th day of October, this Court entered judgment herein in favor of the plaintiff and against the defendant, ordering and adjudging that the plaintiff have and recover of and from the defendant the possession of all of the property sued for in this action, to-wit: all the property described in Plaintiff's Complaint herein except the last nine items on page 6 of the schedule attached thereto and all the items on pages 7 and 8 of such schedule, save the last, or in the event that possession thereof be refused or not delivered, that the plaintiff have judgment against the defendant for the sum of Forty-two Hundred Forty-three and 50/100 Dollars (\$4243.50), with interest thereon at the rate of six per cent per annum from the 19th day of September, 1916, and that the plaintiff recover its costs herein, in which judgment and the proceedings had thereunto certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition;

WHEREFORE, this defendant prays that a Writ of Error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record proceedings and

papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals. And defendant, petitioner herein, prays that the judgment rendered in this cause as above described may be reversed, held for naught and that said cause be remanded for further proceedings.

F. T. MEYER, Petitioner.
DOLPH, MALLORY, SIMON & GEARIN
and HALL S. LUSK,
Attorneys for Defendant.

Due service of the foregoing petition for Writ of Error is hereby admitted this 13th day of November, 1916.

> BRONSON, ROBINSON & JONES, Attorneys for Plaintiff.

Filed November 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 14th day of November, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to-wit:

# ASSIGNMENT OF ERRORS.

The defendant in this action in connection with his Petition for a Writ of Error, makes the following Assignment of Errors, which he avers occurred upon the trial of the cause, to-wit: I.

The District Court of the United States for the District of Oregon erred in refusing to find that the personal property to recover the possession of which this action was brought was sold to the Oregon City Lumber & Manufacturing Company for the purpose of having the same installed in and to become a part of a mill then in course of remodeling by said Oregon City Lumber & Manufacturing Company, and in refusing to find that the plaintiff had full knowledge at the time of such sale of the purpose for which said machinery was purchased and would be used.

#### II.

The said Court erred in refusing to find that said personal property became a part of the said mill owned by said Oregon City Lumber & Manufacturing Company and still remains attached to and a part of said mill.

# III.

The said Court erred in deciding that said personal property was a subject of replevin and in not finding that when said property became affixed to said mill building it became a part of the realty and no longer subject to replevin.

# IV.

The said Court erred in deciding that the said sale of said personal property to the Oregon City Lumber & Manufacturing Company was a conditional sale, and in refusing to find that the same was an absolute sale and vested complete title to said personal property in the Oregon City Lumber & Manufacturing Company.

#### V.

The said Court erred in refusing to find that no memorandum of the sale of said personal property, stating the terms of said sale or any description of said personal property or signed by the vendor or vendee, nor any memorandum whatever was ever filed in the County Clerk's office or Recorder's office of the County of Clackamas, State of Oregon, at any time.

#### VI.

The said Court erred in refusing to find that, although the sale of said property might have been intended by the plaintiff to have constituted a conditional sale, retaining title to the property in plaintiff, yet by the provision of Section 7414, Lord's Oregon Laws, plaintiff not having filed any memorandum of said sale as required by that section, the condition became void, and the title vested absolutely in the Oregon City Lumber & Manufacturing Company.

#### VII.

The said Court erred in refusing to find that on the 21st day of April, 1911, after having given due notice as provided by statute, the assignee of the Oregon City Lumber & Manufacturing Company duly and regularly sold all of said personal property to the defendant in this suit, and delivered possession thereof to said defendant; and in refusing to find that the plaintiff herein had actual notice thereof and was present at the time of said sale and made no objection thereto.

#### VIII.

The said Court erred in refusing to find that the plaintiff, by permitting said sale and by being present at said sale and not objecting thereto, must be held to have waived any rights which it might have had and is now estopped to assert such or any rights in opposition to the title of the defendant to said property.

#### IX.

The said Court erred in awarding and entering judgment in favor of the plaintiff and against the defendant for the possession of said property, or the value thereof, and in not awarding and entering judgment in favor of the defendant for his costs and disbursements.

#### X.

The said Court erred in overruling defendant's objection to the questions asked the witness Edward I. Garrett as to the significance of the phrase "machinery contract," as used by the trade, and allowing said witness to answer: "It is a general term that is commonly used in the sale of machinery, whereby the vendor intends to retain title until the machinery is paid for," and said Court erred in overruling defendant's objection to the question

asked said witness: "How does it compare with the phrase "conditional sale?", and in allowing said witness to answer: "Synonymous." (See Bill of Exceptions, pages 2 and 3.)

DOLPH, MALLORY, SIMON & GEARIN and HALL S. LUSK,
Attorneys for Defendant.

Due service of the foregoing Assignment of Errors is hereby admitted this 13th day of November, 1916.

BRONSON, ROBINSON & JONES, Attorneys for Plaintiff.

Filed November 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Tuesday, the 14th day of November, 1916, the same being the 8th Judicial Day of the regular November, 1916, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

#### ORDER ALLOWING WRIT OF ERROR.

On this 14th day of November, 1916, comes the defendant, by his attorneys, and files herein and presents to the Court, his Petition, praying for the allowance of a Writ of Error intended to be urged by it and praying also that a transcript of the record and proceedings and papers upon which the judg-

ment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such appeal and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the Writ of Error upon the defendant giving bond according to law, in the sum of \$5000, which shall operate as a supersedeas bond.

CHAS. E. WOLVERTON, Judge.

Filed November 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 14th day of November, 1916, there was duly filed in said Court and cause, a Bond on Writ of Error, in words and figures as follows, to-wit:

#### BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That F. T. Meyer, as principal, and C. D. Latourette, as surety, are held and firmly bound unto the said plaintiff above named, in the full and just sum of Five Thousand (\$5,000.00) Dollars to be paid to the said plaintiff, its successors and assigns; to which payment well and truly to be made, we bind ourselves and our and each of our executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of November, A. D. 1916; and,

Now, the condition of the above obligation is such, that if the said defendant shall prosecute said Writ of Error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of:

B. B. McCarthy.

F. T. MEYER, Principal.

By DOLPH, MALLORY, SIMON & GEARIN,
His Attorneys.

C. D. LATOURETTE (seal), Surety. Examined and approved this 14th day of November, A. D. 1916.

CHAS. E. WOLVERTON,
Judge.

I, C. D. Latourette, being first duly sworn, say that I am a resident of the State of Oregon and a freeholder, and am worth the sum of Ten Thousand Dollars, over and above my just debts and property exempt from execution.

C. D. LATOURETTE.

Subscribed and sworn to before me this 14th day of November, A. D. 1916.

(Seal) B. B. McCARTHY, Notary Public for Oregon.

My Commission expires Oct. 29, 1919.

Due service of the foregoing Bond on Writ of Error is hereby admitted this 13th day of November, 1916.

BRONSON, ROBINSON & JONES, Attorneys for Plaintiff.

Filed November 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 16th day of November, 1916, there was duly filed in said Court and cause, a Praecipe for Transcript, in words and figures as follows, to-wit:

#### PRAECIPE FOR TRANSCRIPT.

To the Clerk of the United States Court:

Kindly prepare for us a Transcript of Record in the above cause, and include therein the following documents:

Amended Complaint.

Answer.

Reply.

Verdict.

Judgment of October 16, 1916.

Bill of Exceptions.

All the Exhibits (except those which are copied in the Bill of Exceptions).

Petition for Writ of Error.

Assignment of Errors.

Order allowing Writ of Error.

Writ of Error.

Bond.

Citation on Writ of Error.

DOLPH, MALLORY, SIMON & GEARIN and HALL S. LUSK,

Attorneys for Plaintiff in Error.

Filed November 16, 1916.

G. H. MARSH, Clerk.

#### STIPULATION WAIVING JURY TRIAL.

It is hereby stipulated by and between the parties to the above entitled suit that a jury is waived and that this case be tried without the intervention of a jury by the court.

BRONSON, ROBINSON & JONES, Attorneys for Plaintiff.

DOLPH, MALLORY, SIMON & GEARIN, Attorneys for Defendant.

Filed January 4, 1916. G. H. MARSH, Clerk.

UNITED STATES OF AMERICA, District of Oregon. ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing printed transcript of record, in the case in said Court in which The Pacific Machinery Company, a corporation, is plaintiff and defendant in error and F. T. Mever is defendant and plaintiff in error, has been prepared by me in accordance with the law and the rules of court, and in accordance with the direction of the praecipe for transcript filed by said plaintiff in error; and I further certify that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, which the said praecipe designated to be included therein, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is \\$...., for printing said transcript, and that the same has been paid by said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this.....day of January, 1917.

# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

F. T. MEYER
PLAINTIFF IN ERROR

VS.

## THE PACIFIC MACHINERY COMPANY, a Corporation

DEFENDANT IN ERROR

### Brief on Behalf of Plaintiff in Error

UPON WRIT OF ERROR
TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

DOLPH, MALLORY, SIMON & GEARIN HALL S. LUSK and C. D. LATOURETTE,

Mohawk Building, Portland, Oregon, Attorneys for Plaintiff in Error.

IRA BRONSON.

Coleman Building, Seattle, Washington, Attorney for Defendant in Error.

Filed

CI YAM

F. D. Monckton, Clerk.



## United States Circuit Court of Appeals For the Ninth Circuit

F. T. MEYER,

Plaintiff in Error,

vs.

THE PACIFIC MACHINERY COMPANY, a Corporation,

Defendant in Error.

### Brief on Behalf of Plaintist in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

#### STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court of the United States for the District of Oregon in favor of the Defendant in Error for the possession of personal property described in the Complaint, or if possession cannot be had, for the sum of \$4243.50 and costs. (Page 32, Transcript of Record.) The action is in replevin and the claim of plaintiff (Defendant in Error) is set out on pages 5, 6, 7, Transcript of Record. After the formal parts of the Complaint, plaintiff says:

#### III.

"That the plaintiff now is, and at all times herein mentioned has been, the owner of and lawfully entitled to the possession of all of that certain personal property situate, lying and being in the mill formerly occupied and operated by the Oregon City Lumber Company at Oregon City, in Clackamas County, State of Oregon; and which machinery is more particularly described and itemized in the schedule hereto annexed and marked Exhibit "A," and made a part of this complaint."

#### IV.

"That on or about April 29th, 1909, plaintiff delivered said personal property to The Oregon City Lumber and Manufacturing Company, a corporation, under a certain contract or letter in writing, accepted by said The Oregon City Lumber and Manufacturing Company, by the terms of which contract the title to said personal property remained in the plaintiff until the full performance of the terms and conditions of said contract to be performed by The Oregon City Lumber and Manufacturing Company and the payment of the amount of the purchase price thereof, and that in case said The Oregon City Lumber and Manufacturing Company failed to perform the terms and conditions of said contract, or failed to make the payments provided to be made by said The Oregon City Lumber and Manufacturing Company, said contract

should become void at the election of the plaintiff, and said property immediately returned to the plaintiff."

#### V.

"That The Oregon City Lumber and Manufacturing Company failed to perform the terms and conditions of said contract, and failed to pay to the plaintiff the purchase price provided for therein, or any part thereof; that the plaintiff has elected to declare said contract void and has given notice thereof to The Oregon City Lumber and Manufacturing Company; that The Oregon City Lumber and Manufacturing Company on or about November 10th, 1909, made an assignment for the benefit of creditors to John J. Cooke and John W. Moffitt; that said John J. Cooke and John W. Moffitt, as assignees of said company, on April 20, 1911, assumed to sell all of the property of said company, including the property above described, to the defendant, F. T. Meyer, and placed said defendant in possession thereof; that said defendant was informed, and had notice that said contract between the plaintiff and The Oregon City Lumber and Manufacturing Company had been declared void, and had notice and was informed that the plaintiff was the owner of said property."

These allegations are all denied by defendant (Plaintiff in Error) and a separate answer and defense is set up, as follows (pages 18, 19, 20 and 21, Transcript of Record):

#### VI.

"And this defendant for a further and separate answer and defense herein, alleges:

"That on or about the 10th day of November, 1909, the Oregon City Lumber & Manufacturing Company was a corporation, organized and existing under the laws of the State of Oregon, and was the legal owner and in possession in Clackamas County, Oregon, of all the property mentioned in Plaintiff's Amended Complaint: that on said 10th day of November, 1909, said corporation being in failing circumstances, made an assignment for the benefit of all its creditors to John J. Cooke and John W. Moffitt and executed in due form of law a deed of general assignment under the laws of the State of Oregon, which deed was executed and acknowledged so as to entitle it to be recorded, and was duly recorded in Book 3, page 205, Record of Deeds for Clackamas County, Oregon, where said property was situated; that said assignees duly qualified as such and accepted said trust and immediately went into possession of all said property."

"That on or about the 21st day of April, 1911, said John J. Cooke and said John W. Moffitt, as such Assignees, in accordance with law duly sold all said property at public auction to the highest and best bidder for cash in United States Gold Coin; that prior to said sale, said sale was duly advertised according to law and plaintiff had due notice of said sale and of the time and place when the

same was to take place, and the terms thereof, and was represented at said sale by E. I. Garrett, its General Agent and Manager."

"That at said sale this defendant bid in the said property and the whole thereof and became the purchaser of all said property and the same was delivered to him by said John J. Cooke and said John W. Moffitt and defendant went into possession thereof at once and defendant has ever since remained and now is in possession of the same."

"That at said sale the said plaintiff was present by its General Agent and Manager, E. I. Garrett, and made no objection to said sale and made no claim to said property, or any part thereof, and consented to said sale."

"That at such sale this defendant was the highest and best bidder and bought said property at public auction in good faith and for full value."

"That neither said John J. Cooke nor John W. Moffitt nor this defendant ever had any notice or knowledge that there was any actual or pretended defect in the title to said property, or that plaintiff claimed that it had any interest in said property except as a general unsecured creditor of said Oregon City Lumber & Manufacturing Company, and this defendant alleges that he was on said April 21st, 1911, ever since has been and now is a bona fide purchaser in good faith for full value of all said property."

"And this defendant alleges that plaintiff by reason of its participation in said sale and because it stood by and permitted this defendant to purchase the same at said sale in the manner and under the conditions hereinabove alleged, is and of right ought to be forever estopped to set up any claim or title to said property, or any part thereof as against this defendant, and particularly the claim set out in Plaintiff's Amended Complaint."

"And this defendant further alleges that when said personal property was sold by plaintiff on said 29th day of April, 1909, it was sold for the purpose of being used in a lumber and planing mill, and plaintiff had actual knowledge that it would be used for that purpose. That upon its being delivered on said April 29th, 1909, to said Oregon City Lumber & Manufacturing Company, it was immediately, with plaintiff's knowledge, used for the purpose above set out, and a large portion of it became attached to and a part of the realty of said mill and became a fixture that could not thereafter be removed, and defendant alleges that the said personal property was attached and is a part of the realty and not subject to replevin."

Upon the issues thus presented the case was tried by the Court without a jury, resulting in the judgment for plaintiff as above set out.

The Plaintiff in Error assigns the following errors relied upon as provided by Subdivision "b," Rule 24 of this Court:

#### I.

The District Court of the United States for the District of Oregon erred in refusing to find that the personal property to recover the possession of which this action was brought was sold to the Oregon City Lumber & Manufacturing Company for the purpose of having the same installed in and to become a part of a mill then in course of remodeling by said Oregon City Lumber & Manufacturing Company, and in refusing to find that the plaintiff had full knowledge at the time of such sale of the purpose for which said machinery was purchased and would be used.

#### II.

The said Court erred in refusing to find that said personal property became a part of the said mill owned by said Oregon City Lumber & Manufacturing Company and still remains attached to and a part of said mill.

#### III.

The said Court erred in deciding that said personal property was a subject of replevin and in not finding that when said property became affixed to said mill building it became a part of the realty and no longer subject to replevin,

#### IV.

The said Court erred in deciding that the said sale of said personal property to the Oregon City

Lumber & Manufacturing Company was a conditional sale, and in refusing to find that the same was an absolute sale and vested complete title to said personal property in the Oregon City Lumber & Manufacturing Company.

#### V.

The said Court erred in refusing to find that no memorandum of the sale of said personal property, stating the terms of said sale or any description of said personal property or signed by the vendor or vendee, nor any memorandum whatever was ever filed in the County Clerk's office or Recorder's office of the County of Clackamas, State of Oregon, at any time.

#### VI.

The said Court erred in refusing to find that, although the sale of said property might have been intended by the plaintiff to have constituted a conditional sale, retaining title to the property in plaintiff, yet by the provision of Section 7414, Lord's Oregon Laws, plaintiff not having filed any memorandum of said sale as required by that section, the condition became void, and the title vested absolutely in the Oregon City Lumber & Manufacturing Company.

#### VII.

The said Court erred in refusing to find that on the 21st day of April, 1911, after having given due notice as provided by statute, the assignee of the Oregon City Lumber & Manufacturing Company duly and regularly sold all of said personal property to the defendant in this suit, and delivered possession thereof to said defendant; and in refusing to find that the plaintiff herein had actual notice thereof and was present at the time of said sale and made no objection thereto.

#### VIII.

The said Court erred in refusing to find that the plaintiff, by permitting said sale and by being present at said sale and not objecting thereto, must be held to have waived any rights which it might have had and is now estopped to assert such or any rights in opposition to the title of the defendant to said property.

#### IX.

The said Court erred in awarding and entering judgment in favor of the plaintiff and against the defendant for the possession of said property, or the value thereof, and in not awarding and entering judgment in favor of the defendant for his costs and disbursements.

#### X.

The said Court erred in overruling defendant's objection to the questions asked the witness Edward I. Garrett as to the significance of the phrase "machinery contract," as used by the trade, and allow-

ing said witness to answer: "It is a general term that is commonly used in the sale of machinery, whereby the vendor intends to retain title until the machinery is paid for," and said Court erred in overruling defendant's objection to the question asked said witness: "How does it compare with the phrase 'conditional sale'?", and in allowing said witness to answer: "Synonymous." (See Bill of Exceptions, pages 2 and 3.)

#### BRIEF OF ARGUMENT

I.

Conditional sales intended as security in lieu of a mortgage are not favored, as against creditors and vendees.

> Houser & Haines Mfg. Co. v. Hargrove, 61 Pac. (Cal.) 660.

> Stockton Savings & Loan Soc. v. Purvis, 112 Cal. 241; 44 Pac. 561.

#### II.

Where a contract for the conditional sale of personal property has been broken by the vendee, the seller may have a choice of one of four distinct remedies, among which he may waive a return of the property, treat the contract as executed on his part, and recover from the buyer the agreed price.

Herring-Marvin Co. v. Smith, 43 Ore. 315, 321. Thienes v. Francis, 69 Ore. 171, 178.

#### III.

Plaintiff in Error contends that the proof shows that the sale was absolute, and the claim that it was conditional was purely an afterthought on the part of Defendant in Error. And, furthermore, even if the sale was conditional, Defendant in Error waived its right to retake the property:

1st. By claiming a lien on the same for the purchase price (pp. 67-68 Tr., Plaintiff's Ex. B) and by filing a bill in equity in the District Court of the United States for the District of Oregon, by which it sought to establish an equitable lien upon said property (Tr. pp. 178-197, Judgment Roll No. 5205, The Pacific Machinery Co. v. Oregon City Lumber Co., et al.)

The assertion of a lien upon property is inconsistent with the existence of title in the one asserting it, is an unequivocal act on his part to treat the property as that of another, and a waiver and abandonment of the title reserved on the sale.

Van Winkle v. Crowell, 146 U. S. 42, 50. Hickman v. Richburg, 26 So. 136; 122 Ala. 638.

Whitney v. Abbott, 77 N. E. 524; 191 Mass. 59. Richards v. Schreiber, 67 N. W. 569, 572; 98 Ia. 422.

On the same principle, an action for the purchase price of property sold under conditional sale contract, waives the right to the title.

Butler v. Dodson & Son, 94 S. W. 703, 704; 78 Ark. 569.

Frisch v. Wells, 200 Mass. 429; 86 N. E. 775; 23 L. R. A. (N. S.) 144. Note.

Smith v. Barber, 53 N. E. (Ind.) 1014, 1016.

2nd. The stipulation in the letter of April 29, 1909 (Tr., p. 34, Plaintiff's Ex. "A"), for \$1500 cash payment on arrival of the machinery was waived by accepting \$100 and failing to demand the rest upon delivery, and by failing to demand the return of the property when the balance was not paid.

Ewing v. Sylvester, 94 S. W. (Tex.) 405. Parker v. Baxter, 86 N. Y. 586. Scudder v. Bradbury, 106 Mass. 422, 427. Scharff v. Meyer, 133 Mo. 428; 34 S. W. 858.

In Johnson v. Iankovetz, 110 Pac. 399, relied on by Defendant in Error upon the argument below, an action of replevin to recover two guns from an innocent purchaser, the Court says, speaking of a sale conditional upon cash payment:

"If the price is not paid at the time of the delivery of the goods, the vendor may *immediately* reclaim them";

and further,

"Some authorities hold that, in case of an innocent purchaser from the vendee, waiver

will be more readily inferred from delivery, if there is no express reservation of title."

#### IV.

The Oregon City Lumber & Manufacturing Co., the vendee, made an assignment of all its property for the benefit of creditors (Defendant's Ex. 8, Tr. pp. 176-178); the Assignees sold the property, including the machinery sued for, to the Plaintiff in Error; Defendant in Error, with full knowledge of all the facts—of the insolvency of the Lumber Company of the assignment for the benefit of creditors—of the advertisement of all this and other property for sale to satisfy in so far as it might the claims of all creditors—of the postponement of the sale to accommodate the Machinery Company—of the final fixing of the date for April 20th, 1911—having sent its Treasurer from San Francisco for the purpose of attending the sale—made no effort to replevin this property or to prevent the sale or notify intending purchasers of any defect in the title—and is thereby estopped to claim it now. (See Tr. pp. 114-115, 117-118, 121-126.)

A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

11 A. & E. Ency. (2nd Ed.), p. 429. Thompson v. Blanchard, 4 N. Y. 303, 309. Gregg v. Wells, 10 Adolph & Ellis, 90. Deneger v. Sonser, 6 Wend. 436.

#### V.

The machinery was attached to the real estate so as to become a fixture thereto (Tr., pp. 88-89); no memorandum of the sale was ever recorded in the office of the Recorder or County Clerk; and the condition reserving title, if any existed, was therefore void as to purchasers.

Section 7414, Lord's Oregon Laws. Chilberg v. Smith, 174 Fed. 805, 808.

#### VI.

Usage can be proved only by the testimony of at least two competent witnesses.

Section 801, Lord's Oregon Laws.

#### VII.

Opposing authorities distinguished:

We desire in this place to refer to two authorities relied on by Defendant in Error below, and cited in the opinion of the District Court, printed at page 25 of the Transcript.

Lundberg v. Kitsap County Bank, 139 Pac. 769.

The right of plaintiff in this case to obtain a judgment against the bank for an amount due under

its note and mortgage on certain mill property depended upon whether or not the sale of the property by one Cordz to Johnson & Lundberg was conditional or absolute. The contract of sale was in writing and was held, with other circumstances in the case, to evidence a conditional sale, and the defendant prevailed.

In the following particulars the case is manifestly to be distinguished from the case at bar:

1st. The writing which provided for cash payment and notes contained this clause:

"And in case of failure of the said Johnson & Lundberg to make any of the above payments, they shall forfeit payments already made by them, and if a dry kiln is built, it also shall be forfeited to me."

2nd. Cordz, the vendor, regarded it as a conditional sales contract, assigning it as such to the bank.

3rd. Everybody else, who had anything to do with it regarded it as a conditional sales contract, except Lundberg, the plaintiff, who claimed under a mortgage on the property sold.

Landigan v. Mayer, 51 Pac. (Ore.) 649.

Cited in the opinion (Tr., p. 30), to the proposition that "the manner in which the machinery was attached to the mill frame excludes the notion that it became part of the realty." But we call atten-

tion to the fact that Plaintiff in Error purchased the realty, and the opinion in this case (written by Judge Wolverton when a member of the Supreme Court) proceeds:

"A purchaser, however, of the realty to which such property has become so annexed for value and without notice or knowledge of the distinctive character cast upon it by the agreement, will take it as a part and parcel of the realty, and his title will prevail as against those claiming under the agreement. (Citing Muir v. Jones, 23 Or. 332; Forrest v. Nelson, 108 Pa. St. 48.)"

Meyer purchased the realty together with the machinery.

A lease carrying the right to possession, with the lessee in possession, must be construed as realty within the meaning of Section 7414, L. O. L.

#### **ARGUMENT**

The history of the case as disclosed by the evidence is as follows:

Prior to April 29, 1909, probably a month prior, the Oregon City Lumber & Manufacturing Company had determined to increase the capacity of their mill at Oregon City, and were in need of additional machinery. They prepared a plan and specifications of what machinery they wanted and submitted the same to various machinery houses for figures,

and among the rest, to the Pacific Machinery Company. Upon the receipt of replies from the different houses, the bid of the Pacific Machinery Company was the lowest, or at least the most desirable, and Mr. Wm. G. Bohn, President of the Oregon City Lumber & Manufacturing Company, came to Portland to take up with the Manager of the Pacific Machinery Company the details of the contemplated contract with that company for furnishing the machinery.

On April 29, 1909, the parties met in Portland, at which meeting the following offer and acceptance was agreed upon (p. 34, Transcript of Record):

"Portland, Oregon, April 29, 1909.

Oregon City Lumber & Mfg. Co.,

Oregon City, Oregon.

#### Gentlemen:

We propose to furnish you machinery in accordance with attached specifications for the sum of \$4695.00, including a 11x14 Beck type enginee feed, which is not mentioned in the specifications, delivery to be made at Portland. Terms to be \$1500.00 cash on arrival of the machinery, balance to be paid in equal payments of two, three, four and five months dating from shipment of machinery. Transaction to be covered by machinery contract, with notes on deferred payments bearing interest at 8%, notes

to be endorsed by the company as well as by your Mr. Bohn and Mr. Collins, personally.

Yours truly,

PACIFIC MACHINERY COMPANY,

Accepted:

Thos. Garrett, Mgr.

Oregon City Lumber & Manfg. Co.

By Wm. G. Bohn, Prest. George W. Collins."

\$100.00 cash was paid at the time of the signing of this paper (p. 74, Transcript of Record). How soon after this was signed delivery began does not appear. Garrett, who had the matter in charge, does not remember and has no record of the first shipment (p. 48, Transcript), and Bohn says they were very dilatory and delayed the Lumber Company a great deal (pp. 73 and 78, Transcript). However, plaintiff (Defendant in Error) did begin delivery and by July 23 had delivered, according to their opinion, apparently all of what was described in the specifications. Up to this time plaintiff never made any demand for moneys and never asked to have a conditional sales contract signed. On July 23, or a few days after that (Bohn, p. 75, Transcript), plaintiff presented to the Lumber Company the following statement of account (Transcript, page 142, Defendant's Exhibit 3):

#### "Defendant's Exhibit 3.

Portland, Ore., July 23rd, 1909.

Oregon City Lumber & Manfg. Co.,

Oregon City.

PACIFIC MACHINERY Co.

49 First Street.

Dealers in all kinds of

MACHINERY AND MILL SUPPLIES.

Interest at 10% per annum charged on all Past Due Accounts.

To Balance—

Contract ......\$4695.00

Sheets 10-16-17-19-23, &c. . . . . 1115.00

Add'l Charge bit auto trimmer and complete set Iron

Bill herewith for steel pul-

leys, boxes, collars, &c. . . . 168.54

\$6328.54

On May 5th, 1909, we received \$100.00. Deduct this amount from \$2035.54 that is due upon execution of this contract. In other words, get a check for \$1935.54 and the notes signed, also contract."

Accompanying this was an executory contract (Defendant's Exhibit 4, pages 142-145, Transcript). When this was presented to the Lumber Company for signature the Lumber Company refused to sign it. What then occurred is described by Bohn and

his testimony is undisputed. On direct examination Bohn says (pages 76-77-78 of the Transcript):

- "Q. Now, Mr. Bohn, who brought you that paper, or how did you get it—the one you now hold in your hand?
- A. Why, I am not certain, but I think that Mr. Garrett must have given it to us.
  - Q. This one that is in court?
  - A. Yes, sir, I think so.
  - Q. Or the other one?
- A. No, this one here. I never saw the other one.
  - Q. Thomas Garrett?
- A. I don't believe I ever saw the other Garrett; don't know him.
- Q. You think Mr. Thomas Garrett? Somebody gave it to you, anyway?
  - A. Yes, sir.
  - Q. That was what date?
  - A. This is July 23rd.
- Q. 1909. Up to that time had anybody ever said anything at all to you about a conditional bill of sale?
  - A. Xo.
- Q. Did you agree to take a conditional bill of sale?
  - A. No, sir.
- Q. When this was presented to you, what did you say about it?

- A. Why, I just simply refused to execute it. That is all.
  - Q. You told him that was not the contract?
  - A. I didn't execute it. We didn't execute it.
  - Q. And then what happened about it?
- A. Why, the next thing I know, Mr. Bronson here, I think, called on us and asked for a settlement of the account.
  - Q. When was that?
- A. Oh, that was long after this. I don't know how long. But it was some time after that, anyway.
- Q. Do you remember when the concern went into insolvency, when there was an assignment?
- A. No, I don't know those dates. I haven't them in my mind. I objected to the payment of this account, because I thought we were entitled to a discount for delay in shipping, along with changes and other things.
- Q. Well, you say you objected to the payment of the account?
  - A. Yes, sir.
- Q. You considered, then, that you had made a contract whereby you owed this money if they had complied with their contract?
- Q. What do you mean when you say you thought you were entitled to a rebate?
  - A. Will you repeat that?
- Q. What do you mean when you say that you thought you were entitled to a rebate on that account?

- A. Why, they delayed us in the shipment of that machinery, we thought, beyond all reason, and it was just at a critical time in the organization and starting of that business, and not getting this machinery embarrassed it very much at that time, and we thought we were entitled to a discount in their bill, and made a demand on them for a discount.
- Q. That is, for a discount on the amount which you understood was owing?
  - A. Yes, sir.
- Q. Now, I will ask you again, Mr. Bohn. did you at that time or at any time ever agree with these people to take a conditional bill of sale for that property?
  - A. I did not.
  - Q. You understood it to be an absolute sale?
  - A. Yes, sir."

On cross-examination, he says (page 83-84, Transcript):

- "Q. What reason did you give, Mr. Bohn, when that conditional sale contract was presented to you for not signing it, do you know?
- A. I just simply repudiated the whole thing. It wasn't according to my understanding of the trade and transaction.
- Q. You had the machinery then, most of it, didn't you?
- A. Why, they were shipping it. I don't think it was all delivered at that time.

- Q. And there was then some payment due on it—\$1500 or \$2000 payment—wasn't there?
- A. Well, according to that agreement there, I presume there was \$1500 that was coming to them when the machinery was delivered.
  - Q. And the notes were then to be signed?
  - A. When the stuff was delivered.
- Q. And it was to covered by a machinery contract?
  - A. No.
  - Q. That is what it says here, isn't it?
- A. No. Well, it says 'machinery contract,' the contract to be signed. No conditional contract.
- Q. Where is that instrument you had here awhile ago, that you said was presented to you?
- Q. It was the machinery contract, or the form of machinery contract referred to, wasn't it?
  - A. Not according to my understanding."

When Bohn's examination, direct and cross, was concluded, he was examined by the Court, as follows (pages 86-87, Transcript):

#### "Examination by the Court.

Q. Mr. Bohn, when you signed that original contract or letter there, it purports to be a letter containing the words 'Transaction to be covered by machinery contract.' Did you un-

derstand that that condition was in there when you signed the letter?

- A. You mean the 'machinery contract'?
- Q. Yes.
- A. The letter was complete there as we signed it.
- Q. You understand, of course, that that condition was in the contract there?
  - A. Not a conditional sale, no, sir.
- Q. Well, what did you understand a machinery contract was?
- A. Why, I supposed it was the machinery—that they were going to make a contract based on their proposition to furnish that machinery.
- Q. But not a contract with conditional terms?
- A. No, sir, I didn't have any idea of that kind at all.
- Q. Was there any form of contract produced for your inspection at that time?
  - A. No, sir, there was not.
- Q. They didn't tell you what their form of contract was?
  - A. No, sir.
- Q. Did you know anything about their forms of contract that they use generally?
  - A. I did not. I did not, no, sir.
- Q. (Cross.) Didn't Mr. Garrett tell you that they would furnish this only with reservation of title in themselves?
  - A. No."

When Bohn, representing the Lumber Company, repudiated the offered contract and declared to plaintiff (Defendant in Error) it was not the contract of his company and he would not sign it, the plaintiff made no claim for the property and asserted no right to have it returned. On the contrary, plaintiff company tacitly acquiesced in the claim of the Lumber Company and continued furnishing more machinery after the positive declaration of Bohn, representing the Lumber Company, that there was no conditional sales contract. See:

Defendant's	Exhibit	6,	page	167,	June	10,	
1909, amount\$52.08							
Defendant's	Exhibit	6,	page	167,	June	15,	
1909, amo	ount						.60
Defendant's	Exhibit	6,	page	169,	June	24,	
1909, amo	ount						12.00
Defendant's	Exhibit	6,	page	169,	June	24,	
1909, amo	ount						90.13
Defendant's	Exhibit	6,	page	170,	June	25,	
1909, amo	ount						96.07
Defendant's	Exhibit	-6,	page	171,	July	2,	
1909, amo	ount						6.34
Defendant's	Exhibit	6,	page	172,	July	17,	
1909, amo	ount						15.55
Defendant's	Exhibit	6,	page	173,	July	22,	
1909, amo	ount						3.32
Defendant's	Exhibit	6,	page	173,	July	29,	
1909, amo	ount						9.56

Defendant's Exhibit 6, page 174, Aug. 6,
1909, amount
Defendant's Exhibit 6, page 175, Aug. 31,
1909, amount 18.75
Defendant's Exhibit 6, pages 175-6, Sept. 9,
1909, amount 45.00

A comparison of these items with Exhibit "A" of the complaint (pages 8 to 17 of Transcript) will show that practically all of them are included in Exhibit "A," and these various bills show that they were the ordinary memos of sales used in every business where a sale of goods is absolute. They all bear the statement "Sold to" and the warning, "No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice." The continuation of these shipments, after the Lumber Company had repudiated the pretense that the sale was conditional only, is a ratification of the claim of the Lumber Company and excludes the idea that the transaction was anything but an ordinary absolute sale.

Nor is this all. The Lumber Company, after receiving and installing this machinery, was in business until October 28, 1909, when it failed and executed an assignment under the Oregon law providing for assignments for the benefit of creditors (pages 176-177-178, Transcript). The assignment was recorded as provided by law, in the office of the Recorder for Clackamas County, October 29, 1909,

and was notice to everybody. The assignment specifies this property: "Also all of that certain mill property, including all building and machinery, situate on the property." But even if it did not, the statute governs the case. (Volume 3, L. O. L., Sections 7540-7555.)

The plaintiff (Defendant in Error) knew all about this assignment and its effect under the law and made no claim for the delivery of this property or any of it. At this time the Machinery Company claimed, not the *title*, but some sort of a *lien* on it.

On November 13, 1909, we find their attorney, Mr. Bronson, writing to George W. Bohn, who in the reorganization effort was representing the Oregon City Lumber & Manufacturing Company, a letter containing this statement (pages 67-68, Transcript):

"I may say in this last connection that our position with reference to our being entitled to a lien upon the machinery which we put in the mill is based upon the theory that the refusal of the mill company to give us a machinery contract such as we could file under the registry law will not be held by the courts to deprive us of the security which we would undoubtedly have lost had we failed to file such conditional sale through our own laches. We do not think that at the present time there is any necessity for starting into litigation over this question

and we are perfectly content to give the concern every opportunity to get on its feet by an extension."

No assertion here of title. An equitable lien is hinted at and this excludes the idea of title. One cannot have a lien on his own property. At this time there was an effort made to reorganize the Lumber Company, as shown by Bohn's letter of February 8th, 1910 (p. 69, Transcript), but nothing came of it, excepting signing the agreement (Defendant's Exhibit 2, pages 137-141 of Transcript) December 6, 1909. This is signed "Pacific Machinery Company by Ira Bronson, approx. \$5724.86." It is to be noted that those signing the proposition of reorganization as above—Pacific Machinery Company—are denominated "creditors of said company" (page 137, Transcript).

The assignees remained in possession of the property until April 20, 1911, when it was sold in accordance with the procedure provided by the Oregon law for the sale of property by assignees for the benefit of creditors. Up to the time of that sale and for a long time afterwards Defendant in Error never pretended that it had *title* to this property or any right to replevin it.

On the 28th of September, 1911, in the Circuit Court (now District Court) of the United States for the District of Oregon and the same Court this action was started in, the Defendant in Error, as plaintiff filed a bill in equity against the Oregon

City Lumber & Manufacturing Company, John W. Moffitt and John J. Cooke, as Assignees of the Oregon City Lumber & Manufacturing Company, and F. T. Meyer (this Plaintiff in Error) upon this very account. In that case the plaintiff (Pacific Machinery Company), after reciting all the facts involved here, stated its claim thus: "IV. That on account and by reason of the above facts your complainant has during all the times herein mentioned claimed an equitable lien upon said property." And in that suit the plaintiff (Defendant in Error here) prayed for a decree that "Defendant F. T. Meyer holds said property as trustee for this plaintiff."

It is very clear, therefore, that up to that time, September 28th, 1911, this idea of a conditional bill of sale, title remaining in the vendor, had not taken form in the mind of the Pacific Machinery Company. Its officers and representatives had the idea that in some way they were entitled to and ought to have a lien upon the property to secure its purchase price, but they never pretended that the title had not passed. While it is true that in a sale providing for a cash payment at the time of delivery the vendor may insist upon payment before delivery, or if delivery has been made with the idea that delivery and payment are to be concurrent acts and payment is neglected, the vendor may retake the property, yet this privilege must be exercised at once. It is a privilege and may be waived by the vendor, and if it ever existed at all in this case, which we deny, it certainly was waived.

On July 23, 1909, the Oregon City Lumber & Manufacturing Company rejected the Machinery Company's claim and refused to either sign the notes or make the payments demanded by the Machinery Company. If the Machinery Company had then asserted its right to recover the possession of the property it would at least be acting in accordance with what it now claims to have been its understanding of the situation. But it did not do so. It ratified by acquiescence the claim of the Lumber Company and permitted the property to remain attached to the mill and to be used by the Lumber Company until its final disposition through the assignees to this Plaintiff in Error. It appears by the testimony of C. D. Latourette (page 123, Transcript) that the final sale of the property which took place April 20th, 1911, was as a matter of fact continued to that date in order to accommodate the Pacific Machinery Company and at its request. The Pacific Machinery Company and its officers knew all about the sale, and by not objecting consented to it. (Testimony of C. D. Latourette, 123-124, Transcript):

"Q. Had you as attorney for the bank or as attorney for the receiver, or in any capacity, or at all, ever been informed up to that time that the Pacific Machinery Company claimed any title to that property?

A. No, sir, none whatever.

- Q. When did that matter first come to be talked of?
- A. Well, on the day of the sale the Garrett brothers came up—
  - Q. Garrett brothers?
  - A. Yes, sir.
  - Q. Both of them?
- A. I think they were both there. I know this gentleman was there. That sale had been put off, postponed for several months, at the request of Mr. Garrett.

Mr. BRONSON: What is that, Mr. Latourette? I cannot hear what you say.

A. It had been postponed—the advertisement of the sale had been postponed because Mr. Garrett was figuring on organizing a company to take over that property, and it was understood that his brother—this gentleman here—was coming up from California, and we held the sale off until a time when this Mr. Garrett would be able to be here. And there was an understanding between the other Mr. Garrett and this one, too, when he came that morning, that we were to bid that property in, and that the Garretts, or they had connections they said, by which they could organize a company, and take that property over at what we had in it, or what the bank had in it, with the interest. That is all we wanted to get out of it—all we expected to get. And I think they were both there that morning, and Mr. Bronson, too, as I remember. But I don't think they stayed to the sale.

Q. They knew of the sale?

A. Oh, yes, they knew of the sale. And after the sale—now, the understanding was that they were to pay five thousand dollars down, and have terms on the balance. Shortly after the sale, the other Mr. Garrett who was residing in Portland came up and said that they were unable to raise five thousand dollars, and wanted to have the property turned over on the payment of two thousand dollars. And after some little talk, and I think consultation with my partner, I told him that we would be satisfied."

At this time the Pacific Machinery Company's President, Mr. Garrett, was in San Francisco and came up purposely to attend the sale, and was present in Oregon City at the time the bids were opened and made no objection to the course pursued by the Assignees. He says that he spoke to Latourette and to Plaintiff in Error about the claim of the Pacific Machinery Company, who asserted a claim to it, but this is denied. Whatever he said, however, if he said anything, it is manifest from the record that he did not say that the title remained in the Pacific Machinery Company, because up to September 28th, 1911,—five months afterwards—he did not know himself that he was going to claim such a right.

It would be difficult, indeed, to conceive of a case where the facts justified the application of the doctrine of laches, acquiescence, and estoppel more clearly than in this case. There were other cred-This was a going concern. Its credit was a part of its capital. Its apparent ownership of property was the foundation of its credit. A large part of its property, perhaps the greater part of it, consisted of this machinery. The Defendant in Error delivered the machinery to the Oregon City Lumber & Manufacturing Company and permitted it to exercise such acts of ownership over it as to give to the public at large the idea that it did own it, and to use it with that understanding. It appears from the testimony of D. C. Latourette (page 113. Transcript) that the Bank's claim was \$17,-000.00. What the other indebtedness was does not appear. To permit the Defendant in Error to now take this property and all of it, under the circumstances, would be a travesty upon the law. avoid just such a result the Oregon statute providing for the assignment for the benefit of creditors was passed: "No general assignment of property for the benefit of creditors shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims." Sec. 7540, Lord's Oregon Laws.

The Plaintiff in Error at the Assignees' sale was purchaser in good faith, without notice, and for value, and entitled to be protected. The testimony in the case shows conclusively that neither Meyer nor the Assignees nor Mr. Latourette, the attorney for the Bank, ever heard of this claim of the Defendant in Error until after the sale by the Assignees. Mr. Latourette, in addition to his testimony quoted above, described a meeting which he had with Mr. Bronson, the attorney representing the Machinery Company, some time after the sale, as follows (page 126, Transcript):

- "A. Then Mr. Bronson said, 'If you don't do that'-of course there was some more talkif you don't want that I won't give it, at that meeting—but Mr. Bronson said, 'Well, if you don't do that, we are going to make a claim for that machinery.' 'Why,' I says, 'what do you mean?' and he says, 'Conditional sale contract.' 'Well,' I says, 'where is your conditional sale contract?' 'Well,' he says 'we haven't got any in writing, but,' he says, 'we were to get one.' 'Well, now,' I says, 'this is a pretty time to speak about anything of that kind.' And I got up and I told him that we couldn't consent to giving him two years on the first installment, after they had agreed to pay five thousand dollars down, and then I had come down to two thousand dollars.
- Q. Is that the first time that you ever heard of this conditional sale?
- A. That is the first time that I ever heard of it, yes."

Meyer, Plaintiff in Error (page 115, Transcript), says, speaking of the time of the sale and purchase by him:

- "Q. Up to that time, Mr. Meyer, I will ask you if you were informed by anyone, or had any knowledge that the Pacific Machinery Company claimed title to that property, or any part of it?
  - A. I did not know of any."
- Mr. J. J. Cooke, one of the Assignees, testifies (page 118, Transcript):
  - "Q. At the time of the sale, or up to that time, had anybody told you that the Pacific Machinery Company, or any one claimed title to any of that property?
    - A. No, sir.
    - Q. Outside of the Lumber Company?
    - A. No, sir.
  - Q. No such claim was made before the Assignees?
    - A. No, sir."

There is another reason why Defendant in Error must fail here. By Section 7414, Lord's Oregon Laws, it is provided:

"All conditional sales of personal property or leases thereof containing a conditional right to purchase, where the property is thereafter so attached to any real estate as to become a fixture thereto, shall be void as to any purchaser or mortgagee of such real property unless within ten days after said personal property is placed in and becomes attached to said real property a memorandum of such sale, stating its terms and conditions, together with a brief description of said personal property so as to identify it and signed by the vendor and vendee, with a notice endorsed thereon or attached thereto signed by the vendor or his agent describing such real property, shall be filed in the county clerk's or county recorder's office of the county wherein such property and real estate is situated. And in case such memorandum is so filed as herein provided, the terms and conditions thereof shall be valid and binding on all parties and shall be notice to any purchaser, incumbrancer, or mortgagee of such real property of the right, title and interest of the vendor therein, and such property may be removed from said real estate by the vendor upon condition broken in said memorandum."

If the present contention of the Defendant in Error is correct this statute made it obligatory on it to file with the County Clerk of Clackamas County the memorandum of sale mentioned in the section within ten days after said personal property was placed in and became attached to said real property. And this was not done. Defendant in Error was not ignorant of this statute, or its terms and re-

quirements. On the contrary, the letter of Mr. Bronson, quoted above, and found on pages 67-68 of the Transcript of Record, shows conclusively that the company did know of it and recognized its binding effect. It will be claimed now, we assume, that this section of the statute, being the Act of 1909, filed in the office of the Secretary of State February 23, 1909, was not in force at the time of the signing of the agreement, April 29, 1909, because the Legislature of the State of Oregon did not adjourn till February 20th, 1909. But this is not correct. It is clear that the Defendant in Error kept furnishing these articles running along up to September, and that the main and principal part of them were furnished at the time the conditional bill of sale was tendered, July 23rd. The law was in force then and had been since May 20th.

We respectfully submit that upon this record the judgment of the lower Court should be reversed.

DOLPH, MALLORY, SIMON & GEARIN, HALL S. LUSK,

C. D. LATOURETTE,

Attorneys for Plaintiff in Error.



# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. T. MEYER, PLAINTIFF IN ERROR

US.

THE PACIFIC MACHINERY COMPANY, a Corporation,

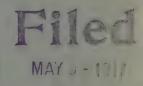
DEFENDANT IN ERROR

### Brief on Behalf of Defendant in Error

UPON WRIT OF ERROR
TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

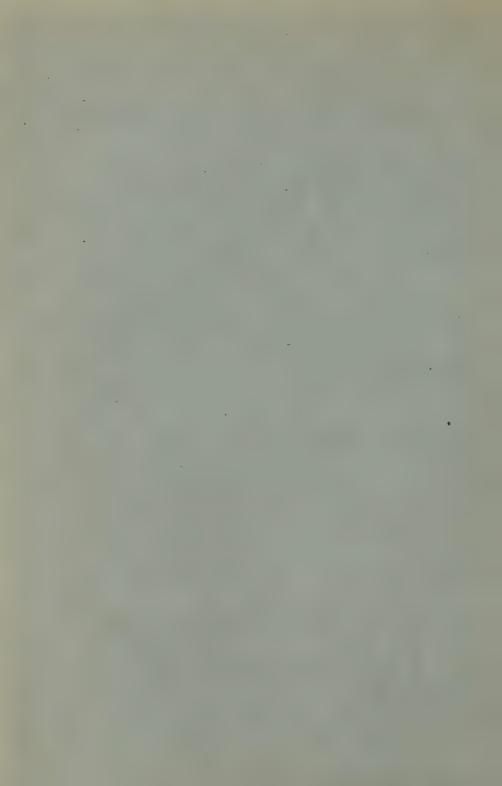
DOLPH, MALLORY, SIMON & GEARIN HALL S LUSK and C. D. LATOURETTE,
Mohawk Building, Portland, Oregon,
Attorneys for Plaintiff in Error.

BRONSON, ROBINSON & JONES, Coleman Building, Seattle, Washington, Attorneys for Defendant in Error.



F. D. Monckton

Clev



# United States Circuit Court of Appeals

For the Ninth Circuit

F. T. MEYER
Plaintiff in Error,

VS.

## THE PACIFIC MACHINERY COMPANY, a Corporation

Defendant in Error.

### Brief on Behalf of Defendant in Error

Upon Writ Error to the District Court of the United States for the District of Oregon.

#### STATEMENT OF THE CASE

The defendant in error is wholly dissatisfied with the recital by the plaintiff in error of the pleadings in lieu of a statement of the facts in the case, and craves the indulgence of the court for the following brief recital:

The defendant in error, a Washington corporation, in response to invitations sent out by the Oregon City Lumber & Manufacturing Company, (which we shall designate The Lumber Company) on April 29, 1909, submitted to the Lumber Company the following proposal in writing:

Portland, Oregon, April 29, 1909.

Oregon City Lumber & Mfrg. Co., Oregon City, Ore.

Gentlemen: We propose to furnish you machinery in accordance with attached specifications for the sum of \$4,695.00, including a 11x14 Beck type engine feed, which is not mentioned in the specifications, delivery to be made at Portland. Terms to be \$1,500.00 cash on arrival of the machinery, balance to be paid in equal payments of two, three, four and five months dating from shipment of machinery. Transaction to be covered by machinery contract, with notes on deferrred payments, bearing interest at 8%, notes to be endorsed by the company as well as by your Mr. Bohn and Mr. Collins, personally.

Yours truly,

#### PACIFIC MACHINERY COMPANY.

Thos. Garrett, Mgr.

#### Accepted:

Oregon City Lumber & Mfg. Co., By Wm. G. Bohn, Pres. Geo. W. Collins. (Plff's. Exhibit "A" Transcript p. 34.)

Attached to such proposal were the specifications therein referred to. The proposal was accepted by Mr. Bohn and Mr. Collins on behalf of the Lumber Company, and in pursuance thereof, continuing at intervals for a term not definitely shown in the record, the defendant in error shipped to the Lumber Company, various items of machinery named in said specifications (See evidence of Thos. S. Garrett, pages 36, 37, 38 and 39, and plaintiff's Ex. "A," page 34 of Transcript). The mill operated by the Lumber Company was leased by it, and on receipt of the machinery it was attached by bolts to the supports in such a manner that it could be detached by merely unscrewing the nuts from the bolts without injury to the machinery or the mill frame. (See evidence of Thos. S. Garrett, p. 43-44 of the Transcript, and the evidence of Edward I. Garrett, p. 100-101 of the Transcript, evidence of D. C. Latourette, p. 109 of the Transcript). During the time while this machinery was being furnished, to-wit, about July 22, 1909, the defendant in error presented to the Lumber Company its regular form of conditional sales contract, (being defendant's Ex. No. 4, p. 142 of the Transcript) for execution and delivery to the defendant in error, and also requested the payment of the cash and the execution of the notes, as provided for in plaintiff's Ex. "A." The Mill Company neither paid the cash nor executed the notes nor signed the machinery contract.

(See evidence of Wm. G. Bohn, pp. 77, 79 and 84 of the Transcript.)

On October 28, 1909, the Lumber Company, which, from the record, we think we may safely assume, was, during all times after July 22nd, in failing circumstances, made a general assignment of its property to John J. Cook and J. W. Moffit, for the benefit of its creditors.

Thereafter, a reorganization was proposed by Geo. W. Bohn in which the defendant in error agreed, conditionally, to participate with the other creditors, among whom was the First National Bank of Oregon City, holder of a chattel mortgage on the mill belonging to the Lumber Company, to which this machinery was attached. Of this bank, the plaintiff in error was, and is, the cashier, and of which bank he is the representative in this litigation (see evidence of F. T. Meyer, pp. 114 and 115 of the Transcript). In connection with this proposed reorganization, on November 13,1909, the attorney for the defendant in error, in response to the request that it cooperate therein, signed such reorganization agreement (see Transcript p. 137 defendant's Ex. No. 2) and transmitted the same with a letter to said George W. Bohn, qualifying its participation in such reorganization, which agreement came into the hands of the plaintiff in error and was produced by him at the trial. In the letter accompanying such agreement was recited in plain language the fact that the plaintiff in error claimed that it was entitled to and should have had a conditional sale contract, but that it was not felt to be necessary that litigation be started at that time, and that the plaintiff in error was willing to give the Lumber Company every opportunity to get on its feet (see plaintiff's Ex. "B," p. 67 of the Transcript). This reorganization plan fell through, and in the spring of 1911, the assignees of the defunct corporation advertised for sealed bids for the machinery furnished by the plaintiff in error and described in Ex. "A," and which is the subject matter of this action, together with other machinery in the mill leased by the Lumber Comand covered by the chattel mortgage to the First National Bank of Oregon City. On April 20, 1911, the assignees received from the plaintiff in error a letter in the form of a bid for the machinery in question, and made a bill of sale of this machinery to the plaintiff in error (see testimony of C. D. Latourette, p. 122 of the Transcript). On the day of the sale the defendant in error, through its president, Mr. E. I. Garrett, accompanied by its attorney, appeared at the place of sale and had considerable conversation with Mr. D. C. Latourette, who, with Mr. C. D. Latourette, seems practically to constitute the First National Bank of Oregon City. It is very positively testified to by E. I. Garrett and Mr. Bronson, attorney for the company, that they informed Mr.

D. C. Latourette, who was representing the bank in this matter, of the purpose of their visit, and of their interest in the property which the assignees of the defunct corporation were proposing to sell under the direction of Mr. C. D. Latourette, as their attorney (see evidence of Edward I. Garrett, pp. 99-100 of the Transcript, and evidence of Ira Bronson, p. 57 of the Transcript). It is true that Mr. D. C. Latourette, at the time of the trial, testified that, to the best of his recollection, nothing was said about the conditional sale rights of the defendant in error, although no explanation was made by him as to why Mr. Garrett should have been attending and conferring with him on the day of the sale unless he had some right or title in the machinery in question (p. 108 of the Transcript). He also says that he was not paving very much attention to the matter, and the whole of his evidence shows that his recollection at the time of the trial was extremely vague (pp. 110, 111 and 112 of the Transcript).

The testimony of the defendant in error also showed that one or both of the assignees were notified of the claim of the defendant in error at the time of the sale in question. It is equally to be admitted that Mr. Cook, one of the assignees, and Mr. Meyer did not recollect being notified by Garrett and Bronson of the rights of defendant in error. But their recollections of the transaction in question were plainly, even confessedly, very vague (see

pp. 118, 119 and 120 of the Transcript). It is also to be noticed that both Mr. C. D. Latourette and Mr. D. C. Latourette, who are brothers, are attorneys and would therefore not be handicapped in acquiring and appreciating the evidence of the rights of the defendant in error in this case. They enter their appearance as solicitors in the Circuit Court of the United States (as shown p. 193 of the Transcript). Moreover, Mr. C. D. Latourette was the attorney for the assignees of the Lumber Company (p. 122 of the Transcript).

The Court below found that the defendant in error had never parted with its title to the machinery in question and awarded it judgment therefor or its value if it could not be delivered.

#### ARGUMENT.

The defendant in error contends:

I.

That the proposal, identified as plaintiff's Exhibit "A," was an agreement that the defendant in error would sell, and the Lumber Company would buy, the machinery in question upon a conditional sale contract.

(a) That this was the intention of the parties is established by what they said (evidence of Thomas S. Garrett, p. 38 of Transcript), and supplemented

by the very language of the exhibit itself, which conclusively shows on its face that *some* contract was to be entered into despite the contradiction of Mr. Bohn thereto. It was further supplemented by the action of the defendant in error in presenting such a contract for signature in due course.

(b) That the meaning of the agreement, as established by the uncontradicted testimony of Edward I. Garrett, by and under the decisions of the Supreme Court of Oregon, cannot now be assailed, *Aldrich vs. Columbia Southern Ry Co.* (Ore.), 64 Pac. 455.

#### II.

That whether or not the original agreement provided that the title should rest under a conditional sale contract, it is beyond controversy, plain that there was no intention of either of the parties that the title should pass at the time when Exhibit "A" was signed.

#### III.

That the rights of the defendant in error, in that respect, are equally good against the original vendece and against its assignees in insolvency, and against the plaintiff in error, who attempted to purchase the property from the assignees as the representative of the bank holding the chattel mortgage, is supported by the cases here-

after cited, and we respectfully contend that the plaintiff in error not only was not a purchaser for value without notice, but that his rights would be no better if he were.

#### IV.

We further urge upon the court that the provisions of the statute of Oregon, requiring conditional sales contracts in certain cases to be recorded, which went into effect May 20, 1909, had no bearing upon the rights of the defendant in error, for the following reasons: (a) Said statute was not in effect when the agreement, Exhibit "A" was entered into.

- (b) It was never possible for the defendant in error to file a conditional sale contract in the form provided by the statute, because it was impossible to procure the signature of the Lumber Company thereto.
- (c) The machinery in question was not attached to the real estate so as to become a fixture thereto. It was not treated as such by any party. It was sold by the assignees to this very plaintiff in error as personal property. It was personal property by the agreement of every party who is shown to have dealt with it, and by its own nature and character.

Landigan vs. Meyer (Ore.), 51 Pac. 649; Hinkel vs. Dillon (Ore.), 17 Pac. 148.

(d) There is no purchaser or mortgagee of

real property concerned in this transaction, and the Oregon statute, unlike the conditional sales statute of Washington and many other states, makes a conditional sale agreement void only as to any purchaser or mortgagee of such real property.

#### V.

Moreover, we further submit that nothing in the record in this case remotely indicates, much less establishes, any laches or waiver on the part of defendant in error of its claim to the property.

Reverting to the first proposition suggested in the argument, the defendant in error urges upon the court that the testimony of Thomas Garrett, wherein he states that he explained to Bohn of the Lumber Company that as part of the machinery sold must be made up specially it would have to be sold on a conditional sale contract whereby the vendor retained the title until it was paid for (Transcript pages 38 and 40), while it is met by the testimony of Mr. Bohn contradicting any such understanding on his part, is borne out by all of the facts and circumstances which are shown to have surrounded this transaction. In the first place, the contract itself, as has already been pointed out, recites that the transaction is to be covered by a machinery contract, and that a payment of \$1500 is to be made in cash upon delivery; and the fact that this machinery must, as admitted by both parties, have been

delivered in installments, naturally presupposes that the payment would follow when it had been substantially delivered. Moreover, notes for the deferred payments were to be furnished at the same time, and these notes are coupled with the requirement with reference to a machinery contract.

The action of the defendant in error was directly in accordance with the interpretation which it has at all times put upon this original agreement. At the time when the machinery in question had been substantially delivered, a contract of conditional sale and notes as provided for in exhibit "A" were presented as a matter of course to the Lumber Company, with the request that they sign the same and make the cash payment. Now, are we confronted by the fact that the Lumber Company offered to pay the cash and sign the notes and repudiated the conditional sale agreement? Not at all. We are confronted by the fact that the Lumber Company repudiated the whole transaction. They neither paid the cash, nor signed the notes, nor executed the conditional sale contract. They did not offer to do any of these things. We think the reason is not far to seek, and that their action at this time simply foreshadowed the financial failure which soon followed. It may not be amiss to point out in passing that the Lumber Company exhibited its lack of a sense of fair dealing in claiming to be damaged in the sum of \$3,000 for delay in shipping \$5,700 worth of machinery, which must admittedly have

been delivered in installments over a considerable period of time, and which machinery, as Mr. Thos. Garrett said, had to be made up specially, and which was delivered between the 29th of April, and the 23rd of July, and the delays for which were attributed by the uncontradicted testimony of Mr. Garrett to the action of the Lumber Company in not furnishing the specifications which had to be provided before some of the machinery could be made (see Transcript pp. 48 and 53). Moreover the issue of this case was very plainly made up by the pleadings. The plaintiff in error was fully advised as to the exact contention which was going to be made in this case. Another man signed this exhibit "A." Surely, if Mr. Garrett is mistaken as to what was said when it was signed, the evidence of Mr. Collins, who also signed the agreement, would have been very persuasive if in support of Mr. Bohn. His testimony was not offered. Nor was his absence accounted for.

Supposing that it can be said that the weight of the evidence does not support the contention as to what the parties agreed should be the interpretation of the phrase "Machinery contract." Edward I. Garrett, a man of twenty-one years experience, and who qualified as an expert in the machinery business, testified that the phrase "Machinery contract," used in such connection, had a well established trade significance, and was synonymous with

the phrase "Conditional sale." Counsel for the plaintiff in error contends that this evidence will not avail the defendant in error, because of the provisions of Section 801 of Lord's Oregon Law to the effect that usage can be proved only by the testimony of at least two competent witnesses.

The transcript of the evidence, page 97, does not disclose that any objection of any kind, or at any time, was made to this evidence, although by an inadvertence an objection to its competency and materiality appears in the bill of exceptions. We think that counsel upon having attention called to this will not rely upon the exceptions in that respect. However, regardless of any objection made, and which was clearly not well taken at the time, and in the absence of any proper attempt to eliminate the testimony at the close of the evidence, we submit that the question is put entirely at rest by the case of Aldrich vs. Columbia Southern R. R. Company. 64 Pac. at p. 458, which case holds squarely against the contention of the plaintiff in error, even if an objection to the competency or the materiality of the evidence was interposed when it was offered. Mr. Garrett was competent; and the evidence when offered, certainly was material. No objection of that kind could possibly reach the question as to whether, before the case was closed, sufficient evidence was introduced to defeat a challenge.

The Court, in the case above cited, says:

"Our statute provides that usage shall be proved by the testimony of at least two witnesses (Hill's Ann. Laws Ore., Sec. 778). The object of this section is to prescribe the quantum of evidence necessary to prove a particular fact. If it be considered that Jeffery's testimony was all that was introduced by plaintiff respecting the meaning which usage by railway contractors and engineers has ascribed to the words "straight cut and fill," when used in a contract for grading a railroad, the objection interposed to the testimony of the witness is insufficient to present the question now insisted upon; for, while the statute has designated the number of witnesses whose testimony is deemed sufficient to prove usage. a party may certainly dispense with the measure of proof so provided. If the court had been requested to withdraw Jeffery's testimony, or to instruct the jury to disregard it, and had refused to grant the request, an exception to its action would have reserved the question insisted upon, but, not having done so, no error was committed in the particulars complained of."

Irrespective of what the parties may say they meant and said, and of what, under any usage, the phrase "Machinery contract" means, the plaintiff in error is confronted with the incontrovertible fact that this contract, Exhibit "A," not only fails to disclose an intention to pass the title to the machinery, being wholly lacking in any words of transfer or conveyance, but it expressly provides that the transaction is not to be consummated until the conditions therein recited are performed. Three separrate concurrent acts were to be performed, to-wit, the payment of the cash, the

signing of the notes for the deferred payments and the execution of a machinery contract, be that what it may. In other words, we submit, as a proposition of law that on the face of the contract, this agreement, whether specific as to the performance of conditions precedent to the passing of title, or indefinite as to the exact terms thereof, was, at the time when entered into, and has at all times remained, a valid and binding agreement, and reserves the title to the machinery in question to the defendant in error, or, to put it in another form, the title did not pass because the instrument shows upon its face that the parties did not intend it to pass.

Such reservation may be either express or implied.

Johnson vs. Iankovitz (Ore.), 110 Pac., p. 399; Lundberg vs. Kitsap County Bank (Wash), 139 Pac., p. 769.

The contract may be oral as well as written.

Blackwell vs. Walker, 5 Fed. 419; Johnson vs. Iankovitz, supra.

Where the agreement is made under such terms and conditions that the title does not pass, but it is reserved to the vendor until the performance of such conditions, the latter may recover the property upon breach thereof, not only from the vendee himself, but from those who purchase of him, even though in good faith, without notice and for value.

Harkness vs. Russell, 118 U. S. 633, 30 L. Ed. 285;

Singer Manufacturing Co. vs. Graham, 8 Ore. 17;

Rosendorf vs. Baker, 8 Ore. 241; Schneider vs. Lee, Ore. 17 Pac. 269; Blackwell vs. Walker, 5 Fed. 419; Johnson vs. Iankovitz (Ore.), 110 Pac. 399.

The Supreme Court of the United States, in the case of *Harkness vs. Russell, Supra*, very succinctly states the law as follows:

"It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority; namely, that in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed."

We do not think there is any substantial ground for the contention that the plaintiff in error was without sufficient and actual notice of the rights of the defendant in error in this case.

As has been pointed out in the statement of the facts, the plaintiff in error is simply the representa-

tive of the bank in Oregon City, which held the chattel mortgage upon the machinery in the Lumber Company's mill. The affairs of this bank appear from the record to be, so far as this transaction is concerned in any event, in the hands of two brothers. D. C. Latourette and C. D. Latourette. D. C. Latourette was attorney for the assignee in insolvency. They produced, at the trial of this case, the conditional sale agreement submitted to the Machinery Company on July 23, 1909 (Tr., p. 76), also the agreement with reference to a reorganization scheme, which the evidence shows was inclosed in a letter signed by the attorney for the defendant in error in which he set up the claim that the defendant in error was entitled to a conditional sale contract. The inference is compelling, and is not denied, that if they received the agreement they received the letter which accompanied it, and that they were familiar with defendant in error's request for signature to its form of contract (Def. Ex. 4; Tr., p. 142).

Regardless, however, of this inference, Edward I. Garrett and Ira Bronson testified positively to their having called upon D. C. Latourette at the bank in Oregon City on the morning when the sealed bid of the plaintiff in error was opened, which resulted in a sale either formal or informal to the plaintiff in error of the machinery in question, along with other machinery in the same mill. Their testimony is to the effect that they advised Mr. Latourette why they were there, and that they claimed a right

to this machinery by reason of their original contract of sale (Transcript pp. 57, 59, 60, 63, 65, 98, 99 and 100). Mr. D. C. Latourette evidently attached no very great importance to the defendant in error or to the parties who called on him, or to what they asserted their claim to be. Of course it is only fair to say that a number of years elapsed between the day of the sale and the trial of this case, but the sum and substance of his evidence was that he didn't recollect the parties having made the claim which they asserted that they made. Nor, for that matter, did he even remember that one of them had called on him. The evidence of the same witnesses is to the effect that they communicated the substance of their claim to one or both of the assignees who made the sale and to Mr. Mever, the plaintiff in error. But Mr. Cook and Mr. Meyer were even more shadowv in their testimony than Mr. Latourette. They did not even remember having seen the witnesses although confessedly they were there. Mr. Cook, one of the assignees didn't even remember who made the sale or where his associate had his office (see Transcript pp. 107, 114, 117 and 121).

The plaintiff in error contends with seeming seriousness that the defendant in error must fail in this case because it's conditional sale agreement was not filed in the office of the Auditor of Klackimas County, Oregon, as it is contended it should have

been filed in compliance with Sec. 7414, Lord's Ore. Laws. The plaintiff in error has not, as required by the rules, set forth this provision of the statute. We quote portions of the section which we think are sufficient to illustrate the merit, or lack of merit, of the contention made by the plaintiff in error.

"All conditional sales of personal property, or leases thereof containing a conditional right to purchase, where the property is thereafter so attached to any real estate as to become a fixture thereto, shall be void as to any purchaser or mortgagee of such real property, unless within ten days after said personal property is placed in and becomes attached to said real property a memorandum of such sale, stating its terms and conditions, together with a brief description of said personal property so as to identify it and signed by the vendor and vendee, with a notice indorsed thereon, or attached thereto signed by the vendor or his agent, describing such real property, shall be filed in the county clerk's office or county recorder's office of the county wherein such property and real estate is situated, and in case such memorandum is so filed as herein provided, the terms and conditions thereof shall be valid and binding on all parties, and shall be notice to any purchaser, incumbrancer or mortgagee of such real property of the right, title and interest of the vendor therein, and such property may be removed from said real estate by the vendor upon condition broken in said memorandum."

As we have indicated before, we think this provision has no bearing upon this case, because this statute confessedly did not go into effect until after the contract in question herein was entered into.

and for the further reason that the vendee made it impossible for the vendor to comply with the provisions of such a statute, and the plaintiff in error was aware of such fact. But, irrespective of the foregoing reasons, we urge our contention as unassailable upon the further ground that this machinery was not attached to any real estate as a fixture. All of the evidence was conclusive and without contradiction that it was simply bolted to its supports by bolts, the nuts of which were screwed off and on, and that it was attached in no other way. It was not intended by anybody to become a part of the realty or a fixture thereto. The plaintiff in error who held a chattel mortgage on it, and who sold it as personal property, and who said it was personal property, and that no real estate was sold, repudiates any such idea as would have to be involved if this were treated as a fixture to real estate. Mr. D. C. Latourette, as appears on page 109 of the transcript, was asked the question by counsel:

Q. And the whole property was sold together—land and building and machinery and all, was it?

A. No land. There was a lease. The building is on leased ground. The machinery is in a building that is on leased ground.

See

Landigan vs. Mayer (Ore.), 51 Pac. 649; Henkel vs. Dillon (Ore.), 17 Pac. 148. But the climax of the whole argument is reached when we read the provision of the statute in question to the effect that such conditional sale "shall be void as to any purchaser or mortgagee of such real property," and the concluding portion of the paragraph which begins, referring to said notice, "and shall be notice to any purchaser, incumbrancer or mortgagee of such real property." We cannot believe that it will be seriously contended that a purchaser whose title is derived through a bill of sale and a chattel mortgage, is a purchaser, incumbrancer or mortgagee of real estate.

Plaintiff in error also contends that defendant in error has lost its rights as vendor upon a conditional sales agreement by waiver. This claim is based upon two circumstances: first, upon the language of the letter from Mr. Bronson to Mr. Bohn (Transcript pp. 67 and 68); second, upon the allegations of the bill in equity brought by defendant in error in the October term of the Circuit Court, 1911 (Transcript p. 179). The underlying thought of both arguments, however, is, apparently, that these circumstances are evidence that no conditional sale was originally contemplated, and that the present claim was an afterthought. This question of evidence upon the contract and the interpretation thereof we have already covered.

One of the most fundamental elements of waiver or estoppel, namely, that the act relied upon oper-

ated to the prejudice of the person seeking to invoke the principle, is wholly lacking. Reference to claim of lien in Mr. Bronson's letter, which, by the way, was not addressed to the plaintiff in error, was coupled with a statement of the facts, clearly showing that he claimed, on behalf of the defendant in error, the benefit of the agreement for a conditional sale. The expression upon which plaintiff in error relies was apparently used in a loose sense, as refering to a right in the property claimed by the defendant in error, and even if a technical construction and reliance is to be placed upon such expression, it is still wholly consistent with the position of the defendant in error, under the established doctrine of vendors' liens for the unpaid purchase price.

Likewise, in the case of the suit in equity, the facts were fully pleaded so that anyone interested was in no wise misled, but, on the contrary was fully apprised of the claim of the defendant in error. It claimed title to the machinery because of such facts, and if it wrongly designated its right as an equitable lien we cannot see with what justice plaintiff in error, after having sustained its objection upon an issue of law, based upon the facts pleaded, can say that the defendant in error is thereby precluded from asserting its proper remedy. That action was brought because the plaintiff, having the idea that the law required a contract to be in writing, and filed, deemed that it had no relief at law. A de-

murrer was sustained to its bill in equity upon the theory that if the real agreement was as plaintiff there contended, and now contends in this case, it had an adequate remedy at law, even without a written contract specifically reserving title. The facts alleged in that case are the facts that have been proved in this, and the ruling of the court there, that plaintiff had an adequate remedy at law, is logically followed in this case by the decision in its favor. We see nothing in that case inconsistent with the present position of the defendant in error upon the facts, nor does it contain anything to mislead the plaintiff in error to his prejudice so as to work an estoppel.

We can readily understand the anxiety of the plaintiff in error to prevent a hearing upon the issue upon the equity side of the court, but we are surprised that he should so far lose sight of the principles of common justice as to endeavor to hold, for the benefit of his principal, the bank, the property which was placed there after its security was acquired, in consideration of which it has extended no credit, and the title to which it has taken with notice of the claim of the defendant in error. This is the claim made on p. 33 of the brief of the plaintiff in error. It is claimed there were other creditors, but none, apparently who became such after this machinery was furnished, or in reliance upon it. It is claimed that the mill was a going concern, when, as a matter of fact, the mill was not in

operation before August but was just being constructed, and the Lumber Company though insolvent, continued to specify and receive machinery practically up to the time it made the assignment. No one was ever misled by any apparent ownership on the part of the mill company of this property, and to allow plaintiff in error to hold it now is simply to donate to it so much additional security upon its claim.

It is respectfully submitted that the judgment should be affirmed.

BRONSON, ROBINSON & JONES, Attorneys for Defendant in Error.

## United States

## Circuit Court of Appeals

For the Ninth Circuit.

WONG CHUNG,

Appellant,

VS.

THE UNITED STATES OF AMERICA,
Appellee.

## Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.



F. D. Monckton,



## United States

## Circuit Court of Appeals

For the Ninth Circuit.

WONG CHUNG,

Appellant,

VS.

THE UNITED STATES OF AMERICA,
Appellee.

## Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record a printed literally in italic; and, likewise, cancelled matter appearing the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated printing in italic the two words between which the omission seem to occur.]	in d-
Pag	ge
Assignment of Errors	28
Attorneys, Names and Addresses of	2
Bond	31
Certificate of Clerk U.S. District Court to Judg-	
ment-roll	6
Certificate of Clerk U.S. District Court to	
Transcript of Record	34
Certificate of Judge	26
Citation on Appeal	1
Names and Addresses of Attorneys	2
Notice of Appeal to the District Court	3
Order Allowing Appeal	29
Order Sustaining Order and Judgment of United	
States Commissioner	5
Petition for Appeal	27
Praecipe for Transcript of Record	34
Statement on Appeal	7
TESTIMONY:	
BRAZIE, W. A	7
Cross-examination	8

Recalled ...... 17

LEVY, CHARLES ...... 16

## Wong Chung vs.

$\mathbf{Index.}$	Page
TESTIMONY—Continued:	
MOY WONG	. 24
WONG CHUNG	. 10
Cross-examination	. 11
Recalled	. 25
WONG DO TOY	. 8
Cross-examination	. 10

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

CASE No. 1119.

THE UNITED STATES OF AMERICA,
Plaintiff,

VS.

WONG CHUNG,

Defendant.

### Citation on Appeal.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at a session thereof to be held at the city of San Francisco in the State of California, on the 9th day of December, A. D. 1916, pursuant to a writ of error on file in the clerk's office of the District Court of the United States in and for the Southern District of the State of California, in that certain action No. 1119, wherein Wong Chung is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said Wong Chung in the said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

WITNESS the Honorable OSCAR A. TRIPPET, United States District Judge of the Southern District of California, this 10 day of Nov., in the year of our Lord, one thousand nine hundred and sixteen and of the Independence of the United States the one hundred and forty-first.

## OSCAR A. TRIPPET,

United States District Judge for the Southern District of California.

Service of a copy of the within Citation is hereby admitted this 10 day of Nov., 1916.

### CLYDE R. MOODY,

Asst. U. S. Attorney, Southern District of California. [3\*]

[Endorsed]: Case No. 1119. In the District Court of the United States, Southern District of California, Southern Division. United States, Plaintiff, vs. Wong Chung, Defendant. Citation. Filed Nov. 10, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [4]

## Names and Addresses of Attorneys.

For Appellant:

DUKE STONE, Esq., 434-438 Merchants National Bank Building, Los Angeles, California.

### For Appellees:

ALBERT SCHOONOVER, Esq., United States Attorney, and CLYDE R. MOODY, Esq., Assistant United States Attorney, Los Angeles, California. [5]

<sup>\*</sup>Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 1119—CRIMINAL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

VS.

WONG CHUNG,

Defendant. [6]

In the United States Commissioner's Court for the Southern District of California, Southern Division.

No. 1119.

UNITED STATES OF AMERICA

VS.

WONG CHANG,

Defendant.

Notice of Appeal to the District Court.

To United States Commissioner Hammack, and Albert Schoonover, United States Attorney in and for said District:

Please take notice, that Wong Chang, the defendant above-named does hereby appeal to the District Court for the Southern District of California, Southern Division, sitting at Los Angeles, California, from the judgment and order of deportation against him made and entered on June 21st, 1916, and from the

whole thereof, and the said appeal is taken both on questions of law and questions of fact.

WONG CHANG. By DUKE STONE, His Attorney.

[Endorsed]: Original. No. 1119—Crim. In the United States Commissioner's Court for the Southern District of California, Southern Division. United States of America vs. Wong Chang, Defendant. Notice of Appeal to the District Court. Reed. Copy within this June 21, 1916, D. M. Hammack, U. S. Commissioner, Clyde R. Moody, Asst. U. S. Atty. Filed June 21, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Duke Stone, 434–436–438 Merchants Natl. Bank Bldg., Los Angeles, California, Phone: F–2132, Attorney for Defendant. [7]

At a stated term, to wit, the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the sixth day of November, in the year of our Lord, one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 1119—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

VS.

WONG CHANG,

Defendant.

# Order Sustaining Order and Judgment of United States Commissioner.

This cause coming on at this time for further proceedings and orders on trial de novo before the Court, defendant having appealed from the order of a U.S. Commissioner for the deportation of defendant; Clyde R. Moody, Esq., Assistant U. S. Attorney appearing as counsel for the United States; defendant being present on bail, with his counsel, Duke Stone, Esq.; and said cause having been argued, on behalf of defendant, by Duke Stone, Esq., of counsel for defendant, and on behalf of the Government by Clyde R. Moody, Esq., Assistant U. S. Attorney, of counsel for the United States; and this cause having been submitted to the Court for its consideration and decision on the pleadings, proofs and argument; it is now by the Court ordered that the order and judgment of the U.S. Commissioner be, and the same hereby is sustained, and that, accordingly, defendant be deported to China; and it is further ordered, on motion of defendant, that defendant be, and hereby is granted a ten (10) days' stay of execution of judgment herein; and it is further ordered that, during said stay of execution of judgment, defendant's bail be, and the same hereby is fixed at \$2500. Defendant is committed to the custody of the U. S. Marshal. [8]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1119—CRIM.

THE UNITED STATES OF AMERICA,
Plaintiffs.

VS.

WONG CHANG,

Defendant.

# Certificate of Clerk U. S. District Court to Judgment-Roll.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the Judgment made and entered in the above-entitled action; and I do further certify that the foregoing papers hereto annexed, constitute the Judgment-roll in said action.

ATTEST my hand and the seal of said District Court, this 9th day of November, A. D. 1916.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer, Deputy Clerk.

[Endorsed]: No. 1119—Crim. In the District Court of the United States for the Southern District of California, Southern Division. The United States of America vs. Wong Chang. Judgment-roll. Filed Nov. 9, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Recorded Min. Book No. 25, page ——. [9]

In the District Court of the United States for the Southern District of California, Southern Division.

No. 1119.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

WONG CHUNG,

Defendant.

### Statement on Appeal.

BE IT REMEMBERED THAT heretofore, to wit, on November 6th, 1916, the above-entitled cause came on for trial before Honorable OSCAR A. TRIPPET of the United States District Court for said district, and the United States appeared by Clyde R. Moody, Assistant U. S. Attorney, and defendant appeared by his attorney, Duke Stone, and each party having announced ready for trial the following evidence was offered on behalf of the plaintiff and defendant, to wit:

## Testimony of W. A. Brazie.

W. A. BRAZIE made the following statement:

Direct Examination.

I am a Chinese inspector, U. S. Immigration Service, and have been such for 12 years. I have known

the defendant since last May. He is sitting behind Mr. Stone. I first saw him in a laundry on North Figueroa Street. I made the arrest while Inspector Conaty, Miller and Nardini were with me. Defendant was washing clothes at the time of the arrest. I asked him if he had a certificate of residence or anything to show his right to be here, and he said no. I asked him concerning his occupation, and he said he was a washman at Sam Kee Laundry. He said he was a Chinaman.

#### Cross-examination.

I have a statement in writing that he told me he was working for a laundry. (Reading:) "Q. What is your occupation? [10] A. Laborer. Washer Sam Kee Laundry, 241 Figueroa Street in Los Angeles." This was taken down at the time he answered the question. It was taken down in shorthand and then transcribed. He signed the note-book—the shorthand notes. (Produced note-book and read): "Q. What is your occupation? A. Laborer. Washer Sam Kee Laundry, 241 North Figueroa Street, Los Angeles." The word "laborer" is there. I wrote that at the Immigration Office after I arrested him and brought him there. Mr. Levy was the Interpreter.

## Testimony of Wong Do Toy.

WONG DO TOY, thru the interpreter, made the following statement:

## Direct Examination.

I am 44 years of age; have lived in Los Angeles 28

(Testimony of Wong Do Toy.)

years. I was born in San Francisco, and I know Wong Chung, the man standing up. I have known him about 20 years—since he came to Los Angeles. I did not know him before he came to Los Angeles. I first got acquainted with him when he came to Los Angeles with his uncle. At that time I kept a restaurant, the Hong On Restaurant, 409 Los Angeles Street. He came to my restaurant with his uncle and he took a meal there, and his uncle took him in the kitchen and he told the poy—the boy at that time was six years old—he told the boy and introduced me to the boy, and told me that a woman would take care of the boy. He stayed with that woman for about three years. Then I asked him to come to my restaurant and peel potatoes and clean vegetables and help in the kitchen. He stayed with me about two or three years. Then he went to work at Gooey Ying Lung's store for four or five years, and after that he went to work in a laundry. I saw him once in a while on the street and would say, "How do you do?" to him and ask, "Where do you work?" He would say, "I am still working," but I had no particular conversation with him. I know him to be the same man as the one who was brought to the restaurant by his uncle about twenty years ago. I testified before the commissioner when we had the hearing. I know Wong Guey; he is his uncle—the uncle [11] that brought him to the restaurant or place of business about twenty years ago. Wong Guey went to work, I don't know where. I don't know Two Chee.

(Testimony of Wong Do Toy.)
Cross-examination.

Wong Guey stayed at my place about a month or a little more and then he went to work—in a hotel or some place—but I don't know where he worked.

## Testimony of Wong Chung.

WONG CHUNG, thru the interpreter, made the following statement:

#### Direct Examination.

I am thirty years of age, I am the defendant. I remember when I was arrested; four men were along at the time. I was arrested in Sam Kee's Laundry where I was washing clothes. I had been working there several years. I lived in Los Angeles twentysome years. I have got lots of friends and clansmen. I had an uncle by name of Wong Gooey. G-u-e-y I would spell it. He came here when I was about five or six years old. I do not remember the time I came, it is so long ago. I was so young then that I do not remember the circumstances when I came to Los Angeles. I don't remember much about my first recollection when I came to Los Angeles, because the city was building new buildings pretty often. I came here with my uncle from San Francisco. I have no parents now. Mr. uncle told me my father died at the fish camp, and I don't know nothing about my mother, if she is living or dead. My uncle told me this after I came to Los Angeles. He told me this about 20 years ago. As to where I have worked and lived since I came to Los Angeles, it has been so long ago that I don't remember, and I have been staying

with my clansmen and their stores, and roomed in so many different places. I have lived in Los Angeles all this time, and the only work I have done during all this time was washing clothes in several different laundries in Los Angeles. Some laundries were closed since. As to where I lived before coming to Los Angeles, I was told by my uncle that [12] I used to live in San Francisco. I was so young then that I do not remember anything about San Francisco. I remember that I came on the train. I don't remember anything that happened before I started from San Francisco, it has been so long ago. I remember that it was a large town.

#### Cross-examination.

I am thirty years old now—Chinese count. I was born in the year K. S. 12—Chinese. (Interpreter said K. S. 12 means 1886.)

Questions and answers in full:

- "Q. Now. I will ask you if on the 2d day of May, 1916, in the Immigration office in this building, present W. A. Brazie, the inspector and examining inspector, and Charlie Levy, interpreter, you were not asked this question and you did not make this answer: "Q. How old are you? A. 30 years, Born K. S. 8, first month 15th day?"
  - A. No, sir; I never did say so.
  - Q. Now, what would K. S. 8 be, Mr. Interpreter? INTERPRETER.—1882."
- Q. And at the same time and in the presence of the same people did you make these answers to these ques-

tions: "Q. What is your father's name? A. Wong Hing Chung. Q. How old is your father? A. He died 20 years ago?"

- A. Yes, my father is Hing Tong.
- Q. Were you asked this question: "Q. How old is your father? A. He died twenty years ago. Q. Where did he die? A. In Chung On Village, China?"
  - A. No, sir; I never did.
  - Q. Have you got a married name? A. No, sir.
- Q. I will ask you if at the same time and place you were not asked this question: "Q. State all your names to which you [13] answer? A. Wong Chung, married name Wong Soe Dung?"
  - A. I only told my name at that time.
- Q. And were you further asked: "Q. Are you married? A. No; I am not married." And were you further asked: "Q. Then how is it that you have a married name?" And did you not answer: "A. Some years ago the Wong people built a large ancestral hall and all members of the family must have a tablet in the ancestral hall, so they gave me a married name in that tablet. I got my married name in that way."
- A. Yes; that is correct. That was told by my uncle, but I never visited China myself and I don't know anything about it.
- Q. Then you have got a married name, haven't you? A. Yes, as told by my uncle.
  - Q. What is your married name?
  - A. I never visited China.

- Q. What is your married name?
- A. I forgot about it—what my uncle told me—now.
- Q. You don't know now what your married name is?
- A. I am not married. How can I get a married name?
- Q. Didn't you just explain you got a married name by your family giving you a married name in the ancestral hall?
- A. Yes. That is all told by my uncle, but I have no knowledge about it.
- Q. Did your uncle tell you you had a married name?
- A. He said I have been a member of the ancestral hall and had a tablet there.
- Q. On the 2d day of May, 1916, Mr. Brazie and Mr. Levy present, were you asked the question: "Q. What is your mother's name?" And did you answer: "A. Lee Shee; died a long time ago. She died after my father's death. She died in Chung On Village, China."
- A. No; not correct. I only told my parents died and I never did tell the length of time of my father's death. [14]
- Q. Now, at the same time and place, were you asked when your father died, and did you answer Kwong Suey 5?
  - A. No; no, sir.
- Q. Kwong Suey 5, Mr. Interpreter, would be 1879, would it not?

INTERPRETER.—Yes.

- Q. Then were you asked referring to your father:
- "Q. When did he go back to China from San Francisco? A. He went to China about two years prior to his death."
- A. No, sir; I never said my father returned to China.
- Q. And then were you asked, "Q. When did your mother die? A. About three or four years after my father died. Q. When did she go back to China? A. She went with my father."
  - A. No, sir; I never did say so.
- Q. And were you asked the question, "Q. When did your mother die? A. About three or four years after my father died."
- A. No, sir; I never did say so, but I was told my father died.
- Q. And at the same time and place were you asked the question, "Q. And she died about K. S. 7 or 8? A. Yes."
  - A. No, sir; I never did say so.
- Q. And were you further asked the question, "Q. Both your father and mother returned to China about two years prior to K. S. 5? A. Yes."
  - A. No, I never did say so.
- Q. Were you further asked the question, "Q. Your father died K. S. 5? A. Yes. Q. And you were born K. S. 8? A. Yes; I am 30 now."
- A. Just now I am thirty years old. I told the truth.
  - Q. Can you speak English? A. No, sir.

Q. Did you ever go to English school? [15]

A. No, sir; I never did, because my parents died when I was very young.

Q. Did you ever attend Chinese school?

A. No, sir; I never attended school, but I learned some from my clansmen. They taught me how to write my name.

Q. You say you never attended school—Chinese school. A. No, sir.

Q. At the time and place, May 2d, 1916, in the Immigration Office in this building, in the presence of Mr. Brazie and Mr. Levy, were you not asked, "Q. Where did you attend school? A. Chinese school here in Los Angeles for several years."

A. Yes, sir. A fortune teller named Lee You Yee taught me in Chinese school, but didn't charge me anything.

Q. Then you did go to school?

A. Yes. He didn't charge me anything. I only studied in the evening time.

Q. Did you ever vote in this country?

A. No, sir.

Wong Chung continues as follows:

I never owned any property here. I was asked in my direct examination to state where I have worked, and I stated I have worked in several Chinese laundries—that is correct. I have been working in laundries, but some of them were closed up. Some years I was without work. I have worked at Guey Ying Lung as cook. I have also been working for Wong Do Toy at his restaurant,—three and some

vears—five or six years. That is the name of the same man that testified. That was the first place I worked when I came to Los Angeles, that is, a long time after. Before I went to work for him I remained with Mov Moo, a woman. She took care of me four or five or six years. I went there when I was five or six years old,—as soon as I can to Los Angeles [16] with my uncle. After I lived with Moy Moo for five or six years I went to work for Wong Do Toy. I worked for him several years. I don't know how many because at that time I was so young and I can't remember. I don't remember my age when I quit Wong Do Toy's place. I quit him approximately more than ten years. It is so long ago I do not remember how long I worked for Wong Do Toy. I cannot make any approximation of the time at all. When I left Wong Do Toy I went to work at Gooey Ying Lung as cook. I worked for him four or five years. Then I was out of work for a while and then I went to work as a washer. I was out of work over a year. I was washing clothes for fourteen or fifteen years. The name of the first place was Hung Han laundry. I don't know how long I stayed there, it has been so long ago. The place was closed up.

## Testimony of Charles Levy.

CHARLES LEVY, a witness on behalf of the Government, made the following statement:

#### Direct Examination.

I am the Chinese Interpreter in the Immigration Service, and have been such for some time last past. (Testimony of Charles Levy.)

I was engaged in my duties as such interpreter on the 2d day of May, 1916. I acted as interpreter in the office of the Immigration Service at the time a statement was taken from the defendant Wong Chung by Mr. W. A. Brazie, on May 2d, 1916. I interpreted all the questions and answers correctly.

## Testimony of W. A. Brazie (Recalled).

W. A. BRAZIE made the following statement:

On the 2d day of May, 1916, I was the examining inspector at the time a statement was taken from the defendant Wong Chung, I took the testimony down in shorthand. A part of it was taken the following morning. This was done through the interpreter. I wrote down in shorthand the questions as I propounded them and answers as they came through the interpreter. I afterwards transcribed my shorthand notes, correctly. I have the shorthand notes with me. The statement shown me is a correct transcript of my notes, made by me personally—it is correct with the possible exception [17] of misspelled words or wrong punctuation.

Re statements in transcript:

MR. MOODY.—I desire to read a portion of that statement concerning which I asked the defendant while he was on the stand. The entire statement I did not ask him about.

MR. STONE.—To save time, I will assume that the questions asked and the answers made that you read and asked him if he did not answer that—that

the record shows that. I assume that you were reading from the record.

Mr. MOODY.—(Reading.) "Q. State all your names. A. Wong Chung, and married name Wong Sai Dung. Q. How old are you? A. 30 years; born K. S. 8-1-15, which would be March 4, 1882." If any of this is not stipulated as to the translation of the Chinese dates, I have a book here, Mr. Stone, and I will produce the dates. I am reading the translation also of the dates.

Mr. STONE.—I suppose that is as reliable as the book.

Mr. MOODY. — (Resuming the reading:) What village does your father belong to? A. Chung On Village, also called Par Sar Long Village, Sun Ning District, China. Q. What is your father's hame? A. Wong Hing Chung. Q. How old is your father? A. He died 20 some years ago. Q. Where did he die? A. In Chung On Village, China. Q. Were you at home when he died? A. No; I was in this country. Q. When did you come to this country? A. I was born in San Francisco; my father left here when I was young. Q. Are you married? A. No; I am not married. Q. Then how is it vou have a married name? A. Some years ago the Wong people built a large ancestral hall and all members of the family must have a tablet in the ancestral hall, so they gave me a married name in that tablet. I got my married name in that way. Q. What is your mother's name? A. Lee Shee; died long time ago. She died after my father's death.

She died in Chung On Village, China. Q. Have you any brothers and sisters? A. No; I am alone. Q. Was your father ever in the United States? A. Yes; [18] he was in San Francisco, and was a laborer." "Q. When did you say he died? A. Died K. S. 5, (1879). Q. When did he go back to China from San Francisco? A. He went to China about two years prior to his death. Q. When did your mother die? A. About three or four years after my father died. Q. When did she go back to China? A. She went with my father. Q. And she died about K. S. 7 or 8? (1881 or 1882.) A. Yes. Q. Both your father and mother returned to China about two years prior to K. S. 5? (1879.) A. Yes. Q. Did you go to China with them? A. No; I never did make a trip there. Q. Where did you live after your father and mother went to China? A. Lived in Los Angeles. I made my headquarters with Gooey On Co. Q. How old were you when your father and mother went to China? A. About when I was six years old. Q. And your father died K. S. 5? (1879.) A. Yes. Q. And your mother died about three years later? A. Yes. Q. And you were born K. S. 8? (1882.) A. Yes; I am 30 now. Q. Are you positive about that? A. I don't know exactly K. S. 8 when I was born, but I know I am 30 years old now. Q. Please write here your name and the place where you make your headquarters?"

(By Mr. MOODY to Mr. BRAZIE.)

Q. Is that place on the book where he wrote the name?

A. He wrote it on the book.

(Reading:) "A. (Tracing of Chinese characters written by witness.) Can you write your name in English? A. No, sir. Q. You state you are now 30 years old; is that Chinese or American count? A. Chinese count. Q. Then you are 29 years of age, American count. A. I don't know, but I am now 30 years old, Chinese count. Q. Are you positive your father died K. S. 5? (1879.) A. Yes. Q. And you were six years of age when your father returned to China?"

The COURT.—Is that 1879? [19]

Mr. MOODY.—1879 that his father returned to China, and he was six years old at that time according to his own statement.

(Reading:) "A. Yes. Q. Who did you live with at that time? A. With nobody. I stayed in a room in Chinatown, San Francisco. Q. Give me the names of some Chinese who knew you in San Francisco. A. I don't know anybody who knows about my birth there. Q. How did you make a living if you were only six years of age when your father left you in San Francisco? A. Some of my clansmen fed me. Q. What are the names of the clansmen who fed you? A. I don't know their names. Q. When did you come to Los Angeles? A. I came here about 20 years ago. Q. What is your occupation? A. Laborer; washer at the Sam Kee laundry, 241 Figueroa Street, in Los Angeles. Q. How long have you worked in that laundry? A. For several years; six or seven years. Q. Have you any papers showing that you were born

in San Francisco? A. No, sir. Q. Did you ever have any papers showing you were born in San Francisco? A. No, sir. I never had any papers. I just know I was born in San Francisco. Q. Have you any witnesses to that effect? A. No; I don't know any. Q. I will ask you again: your father died K. S. 5? (1879.) A. Yes. Q. And your mother died about three years later? A. Yes. Q. And both of them went to China about two years before your father died? A. Yes, sir. Q. And you were six years old then? A. Yes, Q. And you state you were born K. S. —? (1882.) A. Yes. Q. And you were born in San Francisco? A. Yes. Q. Where in San Francisco? A. I don't remember the name of the street, but it was near the park. Q. What was the number of the building? A. I don't remember the number. Q. Name some of the streets in Chinatown, San Francisco? A. Key Lee Sun Street. Q. Where is that street located? A. I think near Chinatown, but I don't remember much myself. Q. Do you know the name of any other streets in San Francisco? A. No. [20] Q. Where did you attend school? A. Chinese school here in Los Angeles for several years. Q. Where was the school located? A. The school located on Los Angeles street, but I don't remember the num-, ber; on the same side where Gooey On store is. Q. Who was the teacher of that school? A. He was a Lee man, but I forget his name now. Q. Where did you live while attending that school? A. In a building in Chinatown. Q. What building in Chinatown ?-- "

Mr. STONE.—Are you reading questions that you asked him on the witness-stand?

The COURT.—I think the entire statement is admissible whether you asked him or not.

(Reading:) "Q. What building in Chinatown? A. Near Jung Suev's: about two doors from there. Q. Who had charge of that building? A. It was an American man owned the building. Q. Who did you pay rent to? A. American man come to collect it. but I don't know his name. Q. How long did vou live in that building? A. For many years. I lived there ever since I came to Los Angeles. Q. Have you a room there now? A. Yes. Q. What is the number of that room? A. There is no number on the room." Then there is an interpolation by the interpreter, or by the inspector relative to a question asked of the defendant. I don't think it is competent. It is simply that the witness informs the interpreter that he has a trunk in that room and so forth. Then there are several questions asked in English. (Reading:) "Q. (In English.) What is your name. A. Hesitates and no answer. Q. How old are you? A. No answer. Q. What do you work at? A. No answer. Q. Are you married? A. No answer. Q. Where do you work? A. No answer. Q. What is your boss' name? A. No answer. (Alien evidently not able to understand any English.) Q. (Through interpreter.) Can you speak English? A. No. Q. And you have lived thirty years in the United States and can speak no English? A. Yes; that is right. I don't know how to speak English. [21] Q. Where

have you worked in Los Angeles, during your twenty years' residence here, besides the Sam Kee laundry? A. Ock Sing Kee laundry on Fifteenth Street, Los Angeles, but that building was destroyed. I heard the building was destroyed and a new building there now. Q. Did you say you were never married? A. No; never married. Q. Have you any children? A. No; I have no children. How could I have if I never married? Q. Were you ever in China? A. No. Q. Were you ever in Mexico? A. No. Q. Have you understood the interpreter at all times during this examination? A. Yes. (Tracing a signature.)"

Then there is the continuation on the third. Reading:) "Q. You state you were born in San Francisco? A. Yes, sir. Q. How do you know this? A. I learned that myself when I was six or seven years old. Q. How did you learn it? A. My clansmen told me so. Q. Have you any witnesses who know vou were born in San Francisco? A. No; I don't remember at the present time, but one could testify for me, but he went to China and died there. Q. Can you name any person who knew you in San Francisco? A. No. Q. How do you expect to prove you were born in San Francisco? A. I don't know how. I don't want to say anything more. I will employ a lawyer for my case. Q. How long did you say you had been working at the Sam Kee laundry? A. Two or three years. Q. You have stated you worked there for six or seven years. Which statement is correct? A. Well, I meant I also worked in other places. Q. Have you been employed continuously at the Sam

Kee laundry for the past two or three years? A. No; I went there a little over two years ago and worked there until about February, 1915, when I quit and went to the Quong Lun Sing laundry and worked there until about the 11th month last year, then went back to Sam Kee laundry and worked there until yesterday. Q. Have you any witnesses to offer as to your birth in San Francisco? A. I don't know myself. I wish you to telephone to Goey On store and get Sai Lut. Q. What does [22] Sai Lut know about your birth? A. He don't know anything about my birth, but he is my closest relative, and maybe he will find some witnesses for me. Q. Do you know the names of any witnesses that he will find who will testify to your birth in San Francisco? A. I don't know myself, and I want to get a lawyer to come up here and then I will tell the story. Q. Have you seen any persons since you have been in Los Angeles who know anything about your birth in San Francisco? A. No. Q. Have you met any Chinese or other persons in Los Angeles who knew you when you were a boy in San Francisco? A. No. Q. Do you know the name of any person who can testify to your birth? A. No. Q. Have you understood the interpreter at all times during this examination? A. Yes."

## Testimony of Wong Moy.

WONG MOY, a witness called on behalf of the defendant, made the following statement:

#### Direct Examination.

I am 67 years old; have lived in Los Angeles a few tens of years. I cannot speak English. I know

(Testimony of Wong Moy.)

Wong Chung—have known him since he was a little boy,—since he was three or four years old. He was big enough then to run around and play and talkjust able to walk. I knew Wong Guey. I don't know anything about Wong Chung when he was in San Francisco, but Wong Guey came to Los Angeles with him and Wong Guey appealed to me that he had no father, and Wong Guey asked me to take care of him. I am sure this is the same boy. I don't know anything about his being in San Francisco, but when this old man took Wong Chung to Los Angeles and asked me to take care of him, since that time and up to now I know him. I can't remember how long it is since he came, but he is a big boy now. I saw him very often since he first came to my house. Mr. Guev told me that Wong Chung was three or four years old when he was brought to me. Guey said that the boy had no parents and that he could not not take care of him himself because he was a man, [23]

## Testimony of Wong Chung (Recalled.)

WONG CHUNG made the following statement:

I did not live in any country except this country. I only lived in Los Angeles and San Francisco. I have no recollection of any other place. I don't know anything about where I was born except what my uncle told me.

It is stipulated that the foregoing is a true and correct statement of the evidence offered on behalf of the plaintiff and defendant in the above entitled action.

Dated November 25, 1916.

CLYDE R. MOODY,

Asst. U. S. Atty., Attorney for Plaintiff.

### Certificate of Judge.

I hereby certify that the foregoing is a true and correct statement of the evidence offered on behalf of the plaintiff and defendant in the above entitled action and that the same is hereby settled as a true and correct statement of said cause on appeal.

Dated November 25th, 1916.

TRIPPET,

United States District Judge.

[Endorsed]: Original. No. 1119. In the District Court of the United States, Southern District of California, Southern Division. United States of America, Plaintiff, vs. Wong Chung, Defendant. Statement on Appeal. Filed November 25, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Duke Stone, 434–436–438 Merchants National Bank Bldg., Los Angeles, California. Phone: F-2132, Attorney for Defendant.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

CASE NO. 1119.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

WONG CHUNG,

Defendant.

## Petition for Appeal.

Comes now Wong Chung, the petitioner above named and the appellant herein, and says:

That on November 6th, 1916, the above-entitled court made and entered its order and judgment ordering the defendant to be deported to China, in which said order and judgment in said entitled cause certain errors were made as to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith:

WHEREFORE, this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof.

Dated at Los Angeles, California, November 10, 1916.

### DUKE STONE,

Attorney for Petitioner and Appellant Herein.
[25]

[Endorsed]: Original Case No. 1119. In the District Court of the United States, for the Southern District of California, Southern Division. United States, Plaintiff, vs. Wong Chung, Defendant. Petition for Appeal. Received copy of within Petition this 10 day of Nov., 1916. Clyde R. Moody,

Asst. U. S. Atty. Filed Nov. 10, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Duke Stone, 434–436–438 Merchants Nat'l Bank Bldg., Los Angeles, California, Phone, F-2132, Attorney for Defendant. [26]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

Case No. 1119.

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

WONG CHUNG,

Defendant.

## Assignment of Errors.

The defendant in this action in connection with his petition for a writ of error makes the following assignment of errors which he avers occurred upon the trial of this cause, to wit:

- 1. The Court erred in not finding that defendant was a native-born citizen of the United States and entitled to be and remain within the said United States.
- 2. The Court erred in sustaining judgment and order of the Commissioner.
- 3. The Court erred in remanding the defendant to the custody of the Marshal and adjudging that he was unlawfully within the United States.

DUKE STONE, Attorney for Defendant.

[Endorsed]: Original. Case No. 1119. In the District Court of the United States, Southern District of California, Southern Division. United States, Plaintiff, vs. Wong Chung, Defendant. Assignment of Errors. Copy received 11–10–16. Clyde R. Moody, Asst. U. S. Atty. Filed Nov. 10, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Duke Stone, 434–436–438 Merchants Nat'l Bank Bldg., Los Angeles, California, Phone, F–2132, Attorney for Defendant. [27]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

CASE NO. 1119.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

WONG CHUNG,

Defendant.

### Order Allowing Appeal.

On this 10 day of November, 1916, came Wong Chung, petitioner herein, by his attorney, Duke Stone, and having previously filed same herein, did present to this Court his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent and transmit-

ted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

NOW, THEREFORE, on consideration thereof, this Court hereby allows the appeal hereby prayed for, and orders execution and remand stayed pending the hearing of the said cause in the said United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered that the said Wong Chung may remain at large upon the bond previously given before this Court in this matter, during the pendency of the appeal taken herein from said judgment; provided said appeal be docketed in the Circuit Court of Appeals within 30 days from date hereof, and that the said Wong Chung do not depart from the jurisdiction of this Court, but [28] remain and abide by whatever judgment shall finally be entered therein.

Dated at Los Angeles, California, Nov. 10, 1916. OSCAR A. TRIPPET,

United States District Judge.

Due service of the within order allowing appeal and receipt of a copy thereof is hereby admitted this —— day of ————, 1916.

			7
United	States	District	Attorney,
By			,
·			Deputy.

O. K.—CLYDE R. MOODY. Asst. U. S. Atty. [Endorsed]: Original. Case No. 1119. In the District Court of the United States, Southern District of California, Southern Division. United States, Plaintiff, vs. Wong Chung, Defendant. Order Allowing Petition for Appeal. Filed Nov. 10, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Duke Stone, 434–436–438 Merchants Nat'l Bank Bldg., Los Angeles, California, Phone, F-2132, Attorney for Defendant. [29]

### Bond.

United States of America, Southern District of California,—ss.

BE IT REMEMBERED, that on this 6th day of November, 1916, came on to be heard the case of the United States vs. Wong Chung, No. 1119 on appeal from the United States Commissioner to the District Court of the United States for the Southern District of California, and the said United States Court having made an order of deportation against said defendant and he having been committed to the United States Marshal on this date, now therefore, we, Leon Escallier and P. F. Pirri as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America, in the sum of twenty-five hundred dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The condition of the above recognizance is such, that, whereas, said order of deportation has been herein made against said Wong Chung on the 6th day of November, A. D. 1916, in the District Court of the United States, for said Southern District of California,

AND WHEREAS, the said Wong Chung has been required to give recognizance, with sureties, in the sum of twenty-five hundred dollars for his appearance,

NOW, THEREFORE, if the said Wong Chung shall personally appear at the District Court of the United States for the Southern District of California, to be holden at the courtroom of said court, in the city of Los Angeles, whenever or wherever he may be required to answer the said order and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court [30] without leave first obtained, and shall appear for deportation and render himself in execution thereof, then this recognizance shall be void; otherwise to remain in full effect and virtue.

WONG CHONG, (Seal)
LEON ESCALLIER. (Seal)
F. P. PIRRI. (Seal)

Acknowledged before me the day and year first above written.

### O. K.—MOODY, Asst. U. S. Atty.

Southern District of California,—ss.

Leon Escallier, F. P. Pirri, being duly sworn, each for himself, deposes and says that he is

a householder in said District, and is worth the sum of twenty-five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

LEON ESCALLIER. F. P. PIRRI.

Subscribed and sworn to before me, this 6th day of Nov., A. D. 1916.

[Seal] JOHN J. BESSOLO,

Notary Public in and for the County of Los Angeles, State of California.

The form of the foregoing Bond and the sufficiency of the sureties thereto is hereby approved.

BLEDSOE,

Judge.

[Endorsed]: No. 119. United States of America, Southern District of California. United States, Plaintiff, vs. Wong Chung, Defendant. Appearance Bond. Filed Nov. 6, 1916. Wm. M. Van Dyke, Clerk. By Geo. W. Fenimore, Deputy. Duke Stone, 434–436–438 Merchants Nat'l Bank Bldg., Los Angeles, California, Phone, F–2132, Attorney for Defendant. [31]

### UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

Clerk's Office.

No. 1119.

UNITED STATES

VS.

WONG CHUNG.

### Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please issue the Judgment-roll, Bill of Exceptions and Petition for Appeal, Order Allowing Appeal and Statement on Appeal.

DUKE STONE, Attorney for Deft.

[Endorsed]: No. 119—Criminal. U. S. District Court, Southern District of California, So. Div. U. S. v. Wong Chung. Praecipe of Defendant for Record on Appeal. Filed Dec. 1, 1916. Wm. M. Van Dyke, Clerk. By Murray C. White, Deputy Clerk. [32]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

NO. 1119—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

VS.

WONG CHUNG.

Defendant.

# Certificate of Clerk U. S. District Court to Transcript of Record.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing thirty-two typewritten pages, numbered from 1 to 32, inclusive, and comprised in one

volume, to be a full, true and correct copy of the Notice of Appeal to the District Court, Order of the Court sustaining the Order and Judgment of the U.S. Commissioner, Clerk's Certificate of Judgment-roll, Statement on Appeal, Petition for Appeal, Assignment of Errors, Order Allowing Petition for Appeal, Appearance Bond, and the Praecipe for Record on Appeal in the above and therein-entitled action, and that the same together constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the appellant by his attorney of record.

I do further certify that the cost of the foregoing record is \$18.40, the amount whereof has been paid me by Wong Chung, the Appellant herein.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the District Court of the United States, in and for the Southern District of California, Southern [33] Division, this 27th day of December, in the year of our Lord one thousand nine hundred and sixteen and of our Independence the one hundred and forty-first.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [34] [Endorsed]: No. 2930. United States Circuit Court of Appeals for the Ninth Circuit. Wong Chung, Appellant, vs. The United States of America, Appellee. Transcript of the Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed January 29, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk.

### **United States**

# Circuit Court of Appeals,

FOR THE MINTH CIRCUIT.

Wong Chung,

Appellant,

vr.

The United States of America,

Appellee.

APPELLANT'S BRIEF.

Filed

APR 1 3 1917

F. D. Monckton,

Duke Stone, Attorney for Appellant.



### No. 2930.

## **United States**

# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Wong Chung,

Appellant,

vs.

The United States of America,

Appellee.

### APPELLANT'S BRIEF.

### STATEMENT.

Appellant appealed from the order of Honorable Oscar A. Trippet, one of the judges of the United States District Court for the Southern District of California, made on November 6th, 1916, which affirmed the order of the United States commissioner for said district ordering the defendant to be deported to China.

Appellant is charged with being a laborer without a certificate of residence.

It is appellant's contention that the court erred in not finding that he was a citizen of the United States by reason of his birth and in ordering him deported to China, as particularly set out in the assignment of errors, page 28 of transcript.

#### EVIDENCE.

In substance the evidence is as follows:

W. A. Brazie testified that he was a Chinese inspector and had known the defendant since last May and saw him in a laundry in Los Angeles, and that defendant was washing clothes and told him he was a washerman.

Wong Do Toy testified that he is 44 years of age and lived in Los Angeles 28 years; that he had known the appellant about 20 years; he became acquainted with the defendant at a certain restaurant in Los Angeles to which place the appellant and his uncle came and that the boy at the time was 6 years old and stayed with him about two or three years, and he knows him to be the boy who was brought to his restaurant 20 years ago, and knew his uncle.

Wong Moy testified that she is 67 years of age; could not speak English and had lived in Los Angeles a long time and knows the appellant since he was three or four years old and remembers when his uncle, Wong Guey, came to Los Angeles with him and explained

that the boy had no father or mother living and she is sure the appellant is the same boy.

The defendant in substance testified that he had never lived in China; that he came to Los Angeles when he was very small and had lived among the Chinese, working at various places with them; his early recollections of his father and mother are very meager because, as shown by the other proof, they had died or left him when he was very young, to live with his relatives.

#### ARGUMENT AND AUTHORITIES.

The testimony of the defendant and his witnesses is very clear and plain to the effect that he was born in San Francisco about 30 years ago. Some apparent discrepancies or confused answers of the defendant in his statements to the immigration inspector are readily explained upon the theory that being apprehended and taken to the office of the immigrant inspectors he was required to answer a great many questions, which are customarily put in a form to confuse and get just such answers.

By section 21 of the Act of February 20th, 1907, the period for the deportation of an alien, subject to deportation under the provision of that act, or of any law of the United States, is fixed at three years. Not only must the alien be deported within that time, but he must be actually sent out of the country within that time.

U. S. v. Oceanic S. S. Co., 211 Fed. 967; International Mercantile Co. v. U. S., 192 Fed. 887. There should be some evidence contradicting statements of appellant's witnesses or something in their testimony rendering the same inherently improbable before the judgment of the trial court ordering the deportation should be sustained.

It is therefore respectfully submitted that the cause should be reversed and appellant discharged.

Respectfully submitted,

DUKE STONE,

Attorney for Appellant.

## **United States**

# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Wong Chung,

Appellant,

US.

The United States of America,

Appellee.

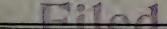
### BRIEF OF APPELLEE.

Albert Schoonover,

United States Attorney;

Clyde R. Moody,
Assistant United States Attorney;

Attorneys for Appellee.



Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

APR 19 1917

F. D. Monckton:



### No. 2930.

### **United States**

# Circuit Court of Appeals,

### FOR THE NINTH CIRCUIT.

Wong Chung,

Appellant,

Us.

The United States of America,

Appellee.

### BRIEF OF APPELLEE.

This case is one arising under the Chinese exclusion laws. The appellant was given a hearing before the United States commissioner and ordered deported, whereupon he appealed to the judge of the District Court for the Southern District of California, who sustained the order of the commissioner ordering the appellant deported to China. Thereupon, appellant appealed to this court.

The prima facie case of the Government was established by the witness W. A. Brazie, who testified [Tr. 7-8] that he arrested the appellant while he was working in a laundry in the city of Los Angeles, and that the appellant admitted to him that he was a Chinese person, a laborer, and that he had no certificate of resi-

dence, whereupon the Government rested and the appellant produced certain witnesses to testify in his behalf relative to his right to be and remain in the United States.

Counsel for appellant with great brevity sketches the testimony of appellant and his witnesses, and then makes the extraordinary statement that "the testimony of the defendant and his witnesses is very clear and plain to the effect that he was born in San Francisco about thirty years ago." How he arrives at his conclusion is hard to ascertain, as no place in the statement of the evidence as given in his brief is there any mention of where the appellant was born, or that he had ever been in San Francisco. However, it is clear that counsel for appellant bases his hope for a reversal of the judgment of the lower court upon his claim that this appellant was born in the United States. Of course, it makes no difference how long a Chinaman may have evaded the laws of the United States or how long he may have resided in the United States; if he is not properly a resident of the United States and has no right to be or remain here, the courts should order him deported. In this case, two witnesses testified to having known the appellant for approximately twenty years, but neither of them know anything at all about the appellant prior to that time, nor did they claim to know anything of his birth. The appellant himself did not testify before the District Court that he was born in the United States, but contented himself with a recital of his life and activities since coming to Los Angeles.

However, the District Court, should such a finding have been necessary, would have been warranted in

finding that the witnesses testifying on behalf of the appellant were not credible because of the variances in their own testimony and that of the appellant himself. On pages 18-24 of the transcript is set out a statement which was taken from the appellant immediately on his arrest by the Chinese inspector. At that time, the appellant testified that his father and his mother both died in China, and that here was no one in the United States who could testify for him, and apparently he was ignorant of the names or addresses of Chinese people in Los Angeles who had any acquaintance whatever with him, but upon his trial before the District Court he appeared with two witnesses who claim to have known him intimately for twenty years. In the same statement, he badly confused dates and places, and his testimony before the District Court was vastly different from that given to the inspector when he was arrested, as will appear from a cursory reading of the transcript.

Section 3 of the Chinese Exclusion Law as amended by the Act of May 5, 1892, provides:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

It was therefore necessary, under this section, for the appellant to satisfy the district judge of his right to be and remain in the United States. He made no defense

of belonging to any of the exempt classes, but apparently relied on the claim, which his counsel now makes in his brief, of nativity. However, this must absolutely fall as there is not one iota of testimony in the transcript to the effect that he was born in the United States. Being a Chinese laborer, if he was not born in the United States, he must be possessed of a laborer's certificate to entitle him to remain here, but he readily admits that he has not and never had such a certificate. Therefore, he is in the United States contrary to law and should be deported to the country from whence he came.

Counsel for appellant cites authorities on page 5 of his brief to the effect that an alien may not be deported from the United States unless such deportation be actually accomplished within three years from the date of his entry, referring to the Act of February 20, 1907, commonly known as "The Immigration Law." Counsel has confused the immigration law with the Chinese Exclusion Law. These proceedings were not instituted under the immigration law, but under the Chinese Exclusion Law of 1882-4, as amended by the Acts of 1888-1892 and 1893. Therefore, the authorities cited by appellant's counsel are entirely out of point.

We respectfully submit that the judgment of the lower court in this case should be affirmed.

ALBERT SCHOONOVER,

United States Attorney;

CLYDE R. Moody,

Assistant United States Attorney;

Attorneys for Appellee.

## United States

## Circuit Court of Appeals

For the Ninth Circuit.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

# Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Hawaii.





## United States

## Circuit Court of Appeals

For the Ninth Circuit.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

## Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Hawaii.



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint	5
Assignment of Errors	40
Attorneys, Names and Addresses of	1
Bond on Writ of Error	44
Certificate of Clerk U.S. District Court to	,
Transcript of Record	46
Citation on Writ of Error	43
Demurrer	11
Judgment	36
Names and Addresses of Attorneys	1
Opinion	15
Order	9
Order Extending Time to Transmit Record on	
Appeal	1
Petition for Writ of Error and Allowance	38
Statement of Clerk	3
Writ of Error	41



### Names and Addresses of Attorneys.

For Plaintiffs, S. M. KANAKANUI, WILL-IAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANA-KANUI:

CASTLE & WITHINGTON, 125 Merchant Street, Honolulu, Hawaii.

For Defendant, United States of America:

S. C. HUBER, Esq., United States District Attorney, Honolulu, Hawaii. [1\*]

In the United States District Court in and for the District and Territory of Hawaii.

No. 86.

S. M. KANAKANUI et al.,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

# Order Extending Time to Transmit Record on Appeal.

Now, on this 22d day of January, A. D. 1917, it appearing from the representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of errors in the above-entitled

<sup>\*</sup>Page-number appearing at foot of page of original certified Transcript of Record.

cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of errors in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to February 23, 1917.

Dated, Honolulu, T. H., January 22, 1917.

HORACE W. VAUGHAN,

Judge, U. S. District Court.

Due service of the above order, and receipt of a copy thereof are hereby admitted this 23 day of January, A. D. 1917.

CASTLE & WITHINGTON. By W. A. GREENWELL.

Filed Jan. 22, 1917, at 9 o'clock and — minutes A. M. George R. Clark, Clerk. By Wm. L. Rosa, Deputy Clerk. [2]

[Endorsed]: No. 86. In the United States District Court for the Territory of Hawaii. S. M. Kanakanui et al., vs. United States of America. Order Extending Time to Transmit Record on Appeal.

In the District Court of the United States, in and for the District and Territory of Hawaii.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

### Statement of Clerk.

TIME OF COMMENCEMENT OF SUIT:

December 12, 1916 (nunc pro tunc, Jan. 28, 1915): Amended Complaint filed.

NAMES OF ORIGINAL PARTIES:

Plaintiffs: S. M. Kanakanui, William R. Castle and William R. Castle as Trustee for said S. M. Kanakanui.

Defendant: The United States of America.

DATES OF FILING OF THE PLEADINGS:

December 12, 1916 (nunc pro tunc, Jan. 28, 1915): Amended Complaint.

April 1, 1915: Demurrer.

### **DECISIONS:**

December 9, 1916: Decision by Clemons, J., sustaining demurrer of defendant.

December 14, 1916: Judgment by Clemons, J., filed and entered.

## DATES OF FILING OF THE PLEADINGS ON APPEAL:

December 26, 1916: Petition for Writ of Error and Allowance.

December 26, 1916: Assignment of Errors.

December 26, 1916: Writ of Error.

December 26, 1916: Citation on Writ of Error.

United States of America, Territory of Hawaii,—ss.

I, George R. Clark, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and the time when the judgment herein was rendered and the judge rendering the same in the cause of S. M. Kanakanui, William R. Castle, and William R. Castle as Trustee for said S. M. Kanakanui, Plaintiffs, vs. The United States of America, Defendant, Civil Docket No. 86, in the United States District Court for the Territory of Hawaii.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 31st day of January, A. D. 1917.

[Seal] GEORGE R. CLARK, Clerk, U. S. District Court, Territory of Hawaii. [4]. In the District Court of the United States in and for the District and Territory of Hawaii.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE as Trustee for said S. M. KANAKANUI,

Plaintiffs,

VS.

UNITED STATES OF AMERCIA,

Defendant.

### Amended Complaint.

S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui, residents of the city and county of Honolulu, Territory of Hawaii, in the District of Hawaii, file this their petition against the United States of America, and for cause of action allege:

That in the said District Court of the United States in and for the District and Territory of Hawaii, in an action there pending between the said United States of America, plaintiff and petitioner, and the said S. M. Kanakanui, William R. Castle, and William R. Castle as trustee for said S. M. Kanakanui, for the condemnation of all the right, title, interest and estate of said S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui for public use in and to a certain tract of land situated at Waikiki, in said city and county of Honolulu, bounded and described as follows, to wit: [5]

Beginning at a point on the northeast or landward side of Kalia Road, bearing by true azimuth 173° 05′ 20″, and distant 499 feet from a copper bolt in a concrete monument on the seaward side of said Kalia Road, said copper bolt being 1.65 feet from the north corner of the former Hobron property, and being located by the following azimuths and distances:

- To Rocky Hill Triangulation Station 200° 51′ 20″, 8,683.0 feet,
- To Leahi Triangulation Station 314° 38′ 10″, 11,077.5 feet,
- To Kaimuki Triangulation Station 275° 24′ 10″, 12,142.8 feet,

the boundary runs by true azimuths as follows:

- 1. 166° 50′ 00″ 247.57 feet along the northeast side of Kalia Road; thence
- 2.  $237^{\circ}$  10′ 00″ 116 feet along the property of the U. S.; thence
- 3.  $352^{\circ}$  00′ 00″ 268.6 feet along the property of the U. S.; thence
- 4.  $345^{\circ}$  00′ 00″ 220.4 feet along the property of the U. S.; thence
- 5.  $62^{\circ}$  28′ 00″ 95.06 feet along the property of the U. S.; thence
- 6. 61° 39′ 14″ 61 feet across Kalia Road, along the property of the U. S.; thence
- 7. 62° 28′ 607 feet more or less along the property of the U. S. to a point on the mean high-water mark;
- 8. Thence westerly along the meanderings of the mean high-water mark to a point on said mean high-water mark which bears 59° 30′, and is

distant 760 feet more or less from the point of beginning; thence

9. 239° 30′ 760 feet more or less along Ocanic avenue to the point of beginning.

Containing an area of 4.3 acres, more or less.

Together with all water, riparian, fishing and other rights, and rights of way and other easements, incidental or appurtenant to the aforesaid tract and parcel of land.

a decree was entered condemning the said right, title, interest and estate of said S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui for the public use of the United States, that is to say, the erection and maintenance thereon of a military post and fortification and for other uses, in which decree it was determined that the value of all improvements on said property condemned to which the said S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui were entitled to be paid was [6] fixed at two thousand dollars (\$2000), and the value of the right, title, interest and estate of said S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui in the aforesaid tract or parcel of land and its appurtenances was fixed and determined to be the sum of three thousand dollars (\$3000); and it was therein decreed that, upon the payment into the registry of this court of the said sum of five thousand dollars (\$5000), being the amount of said two sums, in lawful money of the United States by the United States of America, all the right, title, interest and estate of the said S. M. Kanakanui, William R. Castle and William R. Castle as trustee for said S. M. Kanakanui in and to the property described should vest absolutely in the United States of America, which decree was a final decree in said action and was duly entered in said court on the 7th day of September, 1911.

That the said United States of America has not paid into the registry of this court the said sum of five thousand dollars (\$5000), or any sum, or to the said plaintiffs, or any of them, the said sum or any part thereof, and that two years since said final judgment have elapsed, and all rights obtained by the United States of America in the said judgment have been lost by it, and that the said United States of America, at no time during said two years following said final judgment, notified the plaintiffs or either of them that they did not claim under said judgment, but at all times did suffer the said judgment to remain and did claim under the same.

That by reason of the premises, and particularly by reason of the act of March 3, 1887, 24 Stat. 505, these plaintiffs were entitled to recover against the United States upon a claim [7] founded upon the Constitution of the United States, upon the laws of Congress, upon a contract express or implied, and for their damages in a case not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; and they further allege that they are entitled to recover also against the United States by reason of the provisions of Section 505 of the Revised Laws of

Hawaii, 1905, now section 676 of the Revised Laws of Hawaii, 1915, and pursuant to said Constitution and laws.

That the said S. M. Kanakanui, William R. Castle and William R. Castle as Trustee for said S. M. Kanakanui paid the sum of eleven hundred dollars (\$1100) for attorney's fees in the preparation and trial thereof, and the further sum of sixty-four and 85/100 dollars (\$64.85) for witness fees and other expenses, all of which expenses were reasonable and reasonably incurred, and were damaged in the sum of five thousand dollars (\$5000) for the loss of the use of said property, and for the interest on said five thousand dollars (\$5000) at the rate of seven (7) per cent, per annum from the 11th day of October, 1911.

WHEREFORE, the plaintiffs pray judgment against the said United States of America for the sum of Six Thousand One Hundred Sixty-four and 85/100 Dollars (\$6164.85).

Dated, December 12, 1916.

(Sgd.) S. M. KANAKANUI.

(Sgd.) WILLIAM R. CASTLE.

(Sgd.) WILLIAM R. CASTLE,

Trustee for S. M. Kanakanui.

CASTLE & WITHINGTON,

Attorneys for Plaintiffs. [8]

### Order.

Let this Amended Complaint be filed *nunc pro tunc* as of the date of the filing of the original Complaint

herein, and let the within amendments be, and they are hereby allowed.

12 Dec. 1916.

(Sgd.) CHAS. F. CLEMONS, Judge of the Above Court.

City and County of Honolulu,

Territory of Hawaii,—ss.

S. M. Kanakanui, William R. Castle and William R. Castle, Trustee, the plaintiffs above named, being duly sworn, each for himself says that he has read the foregoing complaint and knows the contents thereof, and that the facts therein stated he believes to be true.

(Sgd.) S. M. KANAKANUI, (Sgd.) WILLIAM R. CASTLE, (Sgd.) WILLIAM R. CASTLE,

Trustee for S. M. Kanakanui.

Subscribed and sworn to before me this 12th day of December, 1916.

(Sgd.) W. A. GREENWELL, (Seal) Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: No. 86. (Title of Court and Cause.) Amended Complaint. Filed Dec. 12, 1916. (nunc pro tunc Jan. 28, 1915.) at 3 o'clock and 55 minutes P. M. (Sgd.) George R. Clark, Clerk. [9]

In the District Court of the United States, in and for the District and Territory of Hawaii.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

VS.

THE UNITED STATES OF AMERICA,

Defendant.

#### Demurrer.

Now comes the defendant, The United States of America, by Jeff McCarn, United States Attorney for the District and Territory of Hawaii, and demurs to so much and such parts of the bill of complaint of S. M. Kanakanui, William R. Castle, and William R. Castle, as Trustee for said S. M. Kanakanui filed in this cause as seeks to recover damages in the sum of five thousand dollars, (\$5,000) for the loss of the use of the property described in said bill of complaint and for interest on said five thousand dollars (\$5,000) at the rate of seven per cent (7%) per annum from the 11th day of October, 1911, and for cause of demurrer to that part of said bill of complaint seeking to recover said damages, says: [10]

I.

- a. Plaintiffs fail to allege and show in said bill of complaint that they were ever deprived of the use of said property;
  - b. Plaintiffs fail to allege or show that the defend-

ant, The United States of America, were ever in possession of said property, or that the defendant ever had the use of the same, either before or after the entering of the final decree in the condemnation proceedings complained of;

- c. Said bill of complaint fails to allege or show that any one authorized to bind The United States of America, or to act for the United States of America in the premises, took charge of, had possession of, or deprived the plaintiffs of the use and possession of the property described in the bill of complaint;
- d. Section 505 of the Revised Laws of Hawaii, 1915, providing for the payment of interest at the rate of 7% per annum in certain cases, does not and cannot bind the United States of America in this action.

### II.

That plaintiffs' said bill of complaint does not allege or show that plaintiffs, or any one of them, ever owned any estate, title or interest in or to the property described in plaintiffs' bill of complaint.

#### III.

That plaintiffs have not shown or alleged any fact or facts from which it can be ascertained what the interests, if any there be, of the several plaintiffs are, nor is it alleged that plaintiffs have now, or that they have ever had, any estate, title or interest in said property. [11]

# IV.

That the bill of complaint in this cause shows that the title to the real estate described in said bill of complaint never vested in the defendant, the United States of America, hence no binding obligation ever rested upon the defendant to pay the award and no such obligation, therefore, now exists to pay the said sum, or any part thereof, by way of damages.

#### V.

That the right of the defendant, the United States of America, to condemn property for public uses is not the creation of the Territorial statute and such right cannot, therefore, be controlled or limited by any Territorial statute.

### VI.

That section 505 of the Revised Laws of Hawaii, 1915, under which this action was brought, undertakes to authorize the recovery of costs of court, reasonable expenses, and such damages as may have been sustained by reason of the bringing of the action, but said section does not apply to this defendant for the following reasons, viz:

- a. Because the United States never pay costs;
- b. This statute does not and cannot bind the United States of America;
- c. No damages are shown or alleged to have been sustained by reason of the bringing of the action for condemnation.

### VII.

That the plaintiffs have not, in and by said bill of complaint, made or stated such a cause as doth or ought to entitle them, or either of them, to any such relief as is thereby sought and prayed for, from or against the defendant, the United States of America. [12]

WHEREFORE, this defendant demands the judgment of this Honorable Court whether it shall be compelled to make any further or other answer to said bill of complaint, or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

(Sgd.) JEFF McCARN, United States Attorney.

I HEREBY CERTIFY, that in my opinion the foregoing demurrer is well founded in point of law, and the same is not filed for the purposes of delay.

(Sgd.) JEFF McCARN, United States Attorney.

[Endorsed]: No. 86. (Title of Court and Cause.) Demurrer. Filed April 1st, 1915. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy. [13]

In the United States District Court for the Territory of Hawaii.

OCTOBER A. D. 1916, TERM.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

# Opinion.

December 9, 1916.

Eminent Domain—Abandonment of Proceedings— Suit Against Government for Resultant Damages to Property Owner: The United States prosecuted proceedings for condemnation of lands to a judgment of condemnation and valuation, which provided in accordance with the laws of Hawaii that upon payment of the damages title should vest in the Government. Over two years passed without such payment, and the property owners, respondents in the condemnation suit, sued the United States under the Tucker Act (24 Stat. 505), providing for suit on claims founded upon the Constitution and laws of the United States or upon contracts express or implied, or for damages in certain cases wherein the United States is suable, and under Revised Laws of Hawaii, 1905, sec. 505, providing that upon failure to pay the fixed price within two years all rights under the judgment of condemnation shall be lost to the Government and it shall be liable for respondents' costs, reasonable expenses and damages sustained by reason of the bringing of the action; the property owners claiming inter alia that the judgment amounted to a taking of property for which compensation was due under the Constitution, Fifth Amendment. Held, that the suit against the United States was not well founded, for the reason, so far as concerns the local law, that the provision of section 505 as to liability is a matter of substantive law and not of procedure and is therefore not controlling under "conformity" statutes adopting local procedure, and, so far as concerns the Tucker Act, that there was no taking of property for which compensation is due or for which there is any contract express or implied for reimbursement, and that, so far as concerns any claim for damages, such claim as sounding in tort is expressly disallowed by that Act. [14]

Action under the Tucker Act, 24 Stat. 505, for damages resulting from abandonment of eminent domain proceedings; on demurrer to complaint.

- D. L. WITHINGTON (CASTLE & WITHING-TON with him), for plaintiffs.
- S. C. HUBER, United States District Attorney, for the United States. [15]

This is an action against the United States to recover damages arising from proceedings to condemn certain land of the plaintiffs. The complaint alleges that on September 7th, 1911, a decree was entered in those proceedings condemning the right, title and interest of the plaintiffs for the public use of the United States and ordering that their right, title and interest should vest in the United States upon the payment of an award of \$5,000 damages; that no part of this award has been paid, and that the two years' period fixed by Revised Laws of Hawaii, 1905, section 505, (Revised Laws of Hawaii, 1915, section

675), within which such award should be paid, has elapsed, and under that statute all rights obtained by the United States in the above decree have been lost; and that "by reason of the law and particularly by reason of section 505 of the Revised Laws of Hawaii, 1905," the plaintiffs "are entitled to recover their costs of court, reasonable expenses and such damages as they have sustained by reason of the bringing of said action for condemnation," the specific amounts claimed being \$1,100 for attorney's fees in the preparation and trial of the condemnation suit, \$64.85 for witness fees and other expenses, \$5,000 damages for the loss of the use of the condemned property, and interest on the award of \$5,000 at seven per cent per annum from October 11th, 1911. The latter date is thirty days (and a little more) after final judgment, evidently following the provision of section 505, aforesaid, which reads:

"The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure to do so all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed [16] more than thirty days after final judgment, then interest shall be added at the rate of seven per cent per annum. Such payment shall be made to the clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court,

reasonable expenses and such damages as may have been sustained by him by reason of the bringing of the action."

The present action is based, as plaintiffs claim, not only directly upon the local statute just quoted, but especially upon the Tucker Act of March 3, 1887, 24 Stat. 505, sections 1 and 2, this court having under the latter section jurisdiction up to ten thousand dollars (see United States v. Foreman, 5 Okla. 237; Johnson v. United States, 6 Utah, 403; United States v. Johnson, 140 U. S. 703), in case of;

"All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." (Section 1.)

The contention is that this action is within the Tucker Act, as being:

- (a) A claim founded upon the Constitution of the United States;
  - (b) Under a law of Congress;
  - (c) On a contract express or implied.

Though, strictly, the complaint appears to have been drawn in theory on the basis of a right of action under section 505 of the Revised Laws of Hawaii, 1905, nevertheless the case will be considered as if the plaintiffs' allegations were broad enough to unquestionably permit the claims under the Tucker Act, as above stated. And the plaintiffs might rely upon the comprehensive phrase "by reason of the law" in the allegation: [17]

"That by reason of the law, and particularly by reason of section 505 of the Revised Laws of Hawaii, 1905," plaintiffs "are entitled to recover their costs of court, reasonable expenses, and such damages as they have sustained by reason of a bringing of said action for condemnation."

But this allegation is deemed appropriate for recovery under section 505 of the local law, and is not deemed an allegation of a claim based on a "taking of property" under the Constitution, or a claim based on a contract express or implied. The plaintiffs may amend their complaint, if they wish, so as to remove any question, especially as the evident desire of the United States Attorney is to have the case determined on broad and not technical grounds.

As to this action's being "under a law of Congress," the plaintiffs contend that section 505 of the Revised Laws of Hawaii, 1905, above quoted, is applicable because made so by a law of Congress, 26 Stat. 316, Act of August 18, 1890, as follows:

"And hereafter the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement, by condemnation, of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of work for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted."

The provision that "such proceedings" are "to be prosecuted" in accordance with the local eminent domain laws, is merely a provision adopting local procedure—a provision not needed in view of the "conformity" statute, Rev. Stat. sec. 914, Judson v. United States, 120 Fed. 637, 642–643; while, on the other hand, the provision of section 505 of the Revised Laws of Hawaii, 1905, allowing damages, expenses, and costs against the government is a provision of substantive law, rather than of procedure. [18]

The former has to do with remedy, with the means or method of enforcing rights; the latter creates rights in certain cases—rights which did not exist before, the government being in the absence of legislation immune from damages or costs. Carlisle v. Cooper, 64 Fed. 472, 474, 475, (C. C. A., Brown, Circuit Justice, Wallace and Shipman, Circuit Judges); and, as to costs, Downs v. Reno, 124 Pac. 582, 583. In the Federal case just cited "a judgment for costs and allowances against the United States upon the dismissal of the condemnation proceedings under the act of August 1, 1888, c. 728, 25 Stat. 357, was reversed because the Court found no authority for

awarding costs against the United States in such case in the act or in any other act," even in spite of the existence of the "conformity" statute, Rev. Stat. sec. 914. See Treat v. Farmers' L. & T. Co., 185 Fed. 760, 763.

The contention, which is the main one, that the action is supported by "a claim founded upon the Constitution," a claim for "just compensation" for property taken for public use, has had full attention, and the court is impressed with the moral considerations which call for relief from the heavy expense, not to mention other disadvantages, brought upon the plaintiffs by their forced participation in these condemnation proceedings; but, in spite of the able argument in the plaintiffs' behalf, and in spite of the recognized difficulties of the question arising out of the varied provisions of law in different jurisdictions, there is no conviction that there was a "taking" here or that the advantage acquired by the government was "property."

There was certainly no taking of the particular property sought to be condemned. The proceedings were only preliminary to a taking. See United States v. Dickson, 127 [19] Fed. 775; Lamb v. Schottler, 54 Cal. 319, 327; Stevens v. Borough of Danbury, 22 Atl. 1071, 1072 (Conn.); Carson v. City of Hartford, 48 Conn. 68, 87, 88, and other cases discussed hereinbelow.

But the strongest argument in behalf of the complaint has been, that by the judgment of condemnation the Government virtually acquired an option to purchase the plaintiffs' interests for a certain sum of money, that this is a thing of value, property, for which under the Constitution compensation should be paid. And emphasis is laid on the damage suffered through the fact of the tying up of plaintiffs' property for two years,—the interference with the free use and disposition of it because of the so-called lien or cloud upon it resulting from this judgment by which under section 505 of the local laws, the Government by paying the fixed price could at any time within two years acquire title. It is apparent that the plaintiffs have suffered damage and have been put to expense by reason of the condemnation suit, and the judgment, under which the condemnation was to be consummated on payment of a fixed price, might be said to operate as a cloud on the title, but so, in a measure might the very institution and the carrying on of the proceedings, yet for none of these things is the Government liable, unless that cloud results from a "taking" of property. That, however, there here resulted no such legal cloud or lien, see Lamb v. Schottler, 54 Cal. 319, 327.

Was there a taking or acquiring of property by the Government in the so-called "lien" or "option" resulting from the judgment or condemnation? At first sight it might appear so, but on reflection it does not seem that the Government has acquired anything new by this judgment; for it had at all [20] times the right of power to acquire for public purposes that particular piece of land and all interests therein,—or in other words, the owners held it subject to that right or power, and the mere definite fixing of the value for condemnation purposes, the mere decree

that the plaintiffs' property be condemned to be taken by the Government at a certain price does not seem to be, or to amount to, the Government's acquiring of a lien or option in any sense of the word.

By using the equivalent expression "right of purchase" instead of "option," the situation will be more clear. The Government had the right of purchase at the beginning and at all times, the main purpose of the proceedings (at least after the determination of the necessity of the taking) being to fix the price; and yet that right of purchase,—in other words, the mere right of eminent domain,—could never in any true sense be called "property," the taking of which necessitates compensation. Language of the Supreme Court of Connecticut to be later quoted herein may be considered as tending to support the above view (48 Conn. 87–88):

"But the council considered only—did not take. By considering (after the condemnation proceedings had gone so far as to result in the assessment of damages) no new relation between the city and the land came into being; for at all times the land of the plaintiff and of every other owner is exposed to the right of the public to take it for public use. By considering, the taking became more probable than before; but it remained only a possibility; his exclusive possession was not interrupted; the power to sell was not taken from him; his use was made less profitable only by his apprehension lest a possibility might ripen into a certainty."

And the Supreme Court of California has said, in Lamb v. Schottler, 54 Cal. 319, 327:

"When, in the exercise of its sovereign right of eminent domain, the State takes the private property of a person, he has but one right—and that [21] is given to him by the Constitution the right to compensation before he is deprived of his property. The right to take his property in no sense depends upon any contract between him and the public. His assent is not required, and his protestations are of no avail. But, under the Constitution his property cannot be taken until paid for. Up to that time he holds it as he always held it, subject to the right of the State to take it for public use upon compensating him for it. When so taken, the right to compensation, which the Constitution gives him, That right then, for the first time, accrues. would become under the Constitution a vested one. Up to that time he parts with nothing, and the public receives nothing. Prior to that, no lien is impressed upon his property, or cloud cast upon his title, in consequence of any preliminary proceedings. 'Nor indeed can it be said in any legal sense that the land has been taken, until the act has transpired which divests the title or subjects the land to the servitude. So long as the title remains in the individual, or the land remains uncharged by the servitude, there can have been no taking, under conditions which, as already stated, preclude the commission of a trespass. Until the price has been ascertained, the Government is not in a position to close the bargain; and when it is ascertained, if the sum is not satisfactory, the Government may withdraw. The Government is under no obligation to take the land if the terms when ascertained are not satisfactory.' (Fox v. W. P. R. R. Co., 31 Cal. 538.) We know of no method by which the Government could have expressed its dissatisfaction with the price fixed upon the Laguna de la Merced more plainly and positively than by the repeal of the act which provided for its acquisition—and that, too, before any step subsequent to the ascertainment of the price had been taken. It is obvious that the public had acquired no new right under these proceedings before the repeal of the act. and quite as clear that the owners of the property had not."

The plaintiffs have been prejudiced, it is true, and the more prejudiced as the proceedings advanced to the judgment of condemnation and of valuation, but this is merely *damnum absque injuria*.

The so-called taking in the present case seems to be such only as was characterized by Mr. Justice Strong as resulting from "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use." He said in the case of Transportation Co. v. Chicago, 99 U. S. 635, 641, 642: [22]

"Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. . . . The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly v. Green Bay Company, 13 Wall, 166, and in Eaton v. Boston Concord & Montreal Railroad Co., 51 N. H. 504. those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

No authority has been found holding that it is not proper exercise of governmental powers to abandon a condemnation proceeding even after the fixing of the value of the property proposed to be taken—see Lewis, Em. Dom., 3d ed., sec. 955 (656)—with the exception, of course, of certain decisions controlled by statute, as e. g. in Plum v. City of Kansas, 14 S. W. 657 (Mo.), hereinafter mentioned. And such

exercise of governmental powers is still proper even though in a few States a remedy is afforded to reimburse the property owner for damages, costs, etc., incurred. 10 R. C. L. 239, sec. 200. In the absence of such a statute, as section 505 of the local law, under the great weight of authority, if not all authority, a remedy is afforded only where there has been unreasonable delay or malice, but such remedy is expressly excluded by the Tucker Act as sounding in tort. See Id. 238, sec. 200, also In re City of Pittsburg, 90 Atl. (Pa.) 329, 331, col. 2, 332, holding that no such remedy exists apart from the statute. And see 2 Lewis, Em. Dom. 3d ed., 1693, sec. 957 (658).

The opinion in the case of Stevens v. Borough of [23] Danbury, 22 Atl. 1071, 1072, 1073, throws some light on the question of what is a taking, holding, at page 1072, that the fixing of the amount to be paid if the land is taken, constitutes "only a proposed taking"; and it has the following, at pages 1072, 1073, on the matter of damages arising from inconvenience and uncertainty.

"There may be a hardship in compelling a land or mill-site owner to hold his property in entire uncertainty, after an assessment, whether it will be taken or not; but the inconvenience is of the same kind which attends all proceedings for the taking of land for public improvements, and which is incident to the ownership of property in a community, and especially in a city. This inconvenience was shown in a marked degree in the recent case of Carson v. City of Hartford, 48 Comm. 68, where it was held by the court to give no right."

That there can be no recovery for the mere inconvenience, trouble and expense resulting from the condemnation proceedings, see also, United States v. Oregon R. & N. Co., 16 Fed. 524, 531; McCready v. Rio Grande Western Ry. Co., 83 Pac. 331, 333 (Utah).

In the case of Plum v. City of Kansas, 14 S. W. 657 (Mo.), cited in behalf of the plaintiffs, the Court says, at page 658:

"The issue of law here is whether or not interest runs upon the award of damages assessed as compensation for land taken for public use by the judgment of the Circuit Court, pursuant to the terms of the Kansas City charter of 1875, (Sess. Acts 1875, p. 244, art. 7.) The situation of the parties in interest relative to the subject of controversy is this: Neither the plaintiff nor the city was dissatisfied with the original award fixing the value of plaintiff's property, with a view to its appropriation to public use. The long delay in reaching the end of the condemnation case arose from the acts of other parties. During it the plaintiff remained in possession of the land, but his enjoyment and use thereof were not such as belonged to complete ownership. His tenure, then, might be characterized as a sort of base or qualified fee, liable to be determined at any moment by the issue of the appellate proceedings. He could not, with any degree of confidence, improve the property or make any but the most transient agreements for its use. He could not dispose of it except subject to the paramount public easement, which had become impressed upon it. So far as concerned his beneficial rights, as owner, the judgment of condemnation amounted to the taking of the property for public use, and the price for such taking then became justly due him."

But this case is distinguished by the fact that there was no question, as here, of any compensation on account of [24] abandoned proceedings, but under the Missouri statutes "the title to the land is thereby (by the judgment of condemnation) vested in the city for public purposes," Id., col. 2, and such a judgment is differentiated from judgments "under statutes making them merely tentative or expressly or impliedly postponing their final effect," Id., page 659, col. 1.

The cited case of City of St. Louis v. Hill, 22 S. W. 861 (Mo.) involves an undoubted taking, an invasion of property rights in the fixing of a building line which prevented the owner from building on a strip of land forty feet wide. The following language quoted in plaintiffs' brief, has, therefore, no application here, Id., page 862:

"Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment and disposal of that object. It follows from this promise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the *locus in quo*."

If under that language what was done in the case at bar was a taking, then equally well would the mere institution of the proceedings be a taking, for in the latter case, though in a lesser degree, the use and disposal of the plaintiffs' property was interferred with. Such interference, as has been pointed out in the case of Feiten v. City of Milwaukee, 2 N. W. 1148, 1151 (Wis.), would result from an ordinary action of ejectment, and yet in such case there could not be said to be a taking any more than here.

As to the suggestion of the opinion in the case of Shoemaker v. United States, 147 U. S. 282, 321, upon which [25] the plaintiffs rely, that the assessment of damages in eminent domain presumably includes certain incidental damages such as here complained of, and that if the proceedings are abandoned there should be compensation to cover such damages, it is enough to say that, under the general expression of the authorities, the right to abandon without liability to pay the damages awarded necessarily means the right to abandon wihout payment of any of the included elements of damage.

"The weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after condemnation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded." Lewis, Em. Dom. 3d ed., sec. 955 (656).

There is known to us no decision covering the exact question, i. e., no decision in which the acquisition of a so-called "option" or "right of purchase" or "lien" is considered. In United States v. Dickson, 127 Fed. 774, 775, Circuit Judge Pardee went so far as to say, that where "appraisers appointed under the practice in the State of Georgia returned a much larger value for the property than the United States had ever expressed a willingness to pay," and "no physical interference had been made with the property," there had not been any "taking" "of the same in any legal sense." But this is only an opinion of no taking of the property sought to be condemned, and not an opinion of no incidental taking of any property as, e. g., an option as above. In that case a motion of the Government to dismiss the condemnation suit was maintained, it appearing that an intervening Act of Congress had operated as a legislative abatement of the proceedings. Carson v. City [26] of Hartford, 48 Conn. 68, is perhaps more in point. There an assessment of damages had been made as to property proposed to be condemned for a public street. After proceedings had pended for over three years, the city council voted to abandon

the public improvement which required the above property,—and under the city ordinance relating to the opening of streets, it had the right of abandonment, though that fact would not seem to distinguish the case, for if the power of the city to purchase at an assessed price is an "option" or "property," it is, so long as it lasts, no less so in spite of the final right of non-exercise of this option. The Court says, pages 87–88:

"As we have said that no way was laid out, the Court must stand upon the proposition that if the council considers, for any period however brief, the matters of laying out a way, and a provisional award of damages is made to an owner of land if it shall be taken, and he is delayed thereby in the sale, or omits to make profit by the use of it, the city is responsible in damages.

But, the council considered only—did not take. By considering no new relation between the city and the land came into being; for at all times the land of the plaintiff and of every other owner is exposed to the right of the public to take it for public use. By considering, the taking became more probable than before; but it remained only a possibility; his exclusive possession was not interrupted; the power to sell was not taken away from him; his use was made less profitable only by his apprehension lest a possibility might ripen into a certainty."

Adverting to cases cited in support of the claim of damages, the Court observed, at page 89, "these cases

do not determine the law of an instance of a contemplated but unaccomplished taking for public use." Speaking of the case of Pumpelly v. Green Bay Co., 13 Wall. 166, in which the defendant flowed the plaintiff's land without compensation, and of other cases, it is said, at page 88, "Practically each of these acts was a taking of land, was the actual expulsion and exclusion of the owner from it by force." And of another line of cases, it is said, at page 91, "these again are trespasses, and, as we have said, furnish no precedent for making good to a land-owner profits which he omitted to make because of his belief that the city would take his land." [27]

There are numerous State cases, notably in Maryland courts, holding that where the proceedings are not instituted in good faith, or are kept alive for an unreasonable length of time, and finally abandoned, the owner is entitled to be compensated for his expenses and loss. 10 R. C. L. 238, sec. 200. But, as above noted, an action for relief in such case sounds in tort (Id.) and is expressly excepted from the operation of the Tucker Act. By way of parenthesis, it may be said that, presumably, in the State cases, the States had by legislation consented to be sued for torts as well as on contracts. And most of these cases, and probably all of them so far as consequential injuries are concerned, are it seems grounded upon no idea of the taking of property but rather upon that of the damaging of the property within provisions of law allowing compensation not only for taking but for damaging. See Gibson v. United States, 166 U. S. 269, 275, also Bedford v. United States, 192

U. S. 217, 225; 15 Cyc. 653-654, and see, e. g., Winkleman v. City of Chicago, 72 N. E. 1066 (Ill.), in which condemnation proceedings delayed for several years, were abandoned after more than 15 months from entry of judgment fixing the damages. And see Black v. Mayor of Baltimore, 50 Md. 235, 33 Am. Rep. 320, 323, holding that damages in such cases of wrong are not dependent upon whether the assessments of damages for the taking have been completed or not. See also Shanfelter v. Mayor of Baltimore, 31 Atl. 439 (Md.); also Ford v. Board of Park Commissioners, 126 N. W. 1030, 1032 (Ia.), which says that "perhaps as many, if not more, of the courts," have held that there are no damages [28] cases unreasonably delayed and which points out that it is by statute in many States that a right of action has been given.

The fact that it has been found necessary, as in Hawaii (section 505 of the local laws aforesaid), Massachusetts (Downey v. Boston, 101 Mass. 439); Minnesota (Minnesota & N. W. Ry. v. Woodworth, 32 Minn. 452, 21 N. W. 476) and elsewhere (10 R. C. C. 239, sec. 200), to enact legislation giving relief, and the fact that the cases in which relief is given in the absence of such legislation (but doubtless with legislation permitting the Government to be sued for torts) are all cases (as the case at bar is not, under the complaint) of unreasonable delay or want of good faith, seem to militate in some degree against the contentions of the plaintiffs.

So far as the latter class of cases is concerned, it is obvious that any question of delay is quite inde-

pendent of the question of the existence of a taking, and in such cases it is significant that recovery is placed on the ground of unreasonable delay and not on the ground of a taking.

The remedial character of the Tucker Act has been referred to. United States v. Southern Pacific R. R. Co., 38 Fed. 55. That, however, results only in a liberal construction of the Act itself and in no way affects the construction of the word "taking" as used in the Constitution.

If there was not a taking of property, then there could be no basis for a contract express or implied and the claim based on such a contract would fall to the ground. United States v. Lynah, 188 U. S. 444, 462, 472; United States v. Great Falls Mfg. Co., 112 U. S. 645, 656, 657; Peabody v. United [29] States, 231 U. S. 530, 538, 539; McReady v. Rio Grande Western Ry. Co., 83 Pac. 331, 333; Lamb v. Schottler, 56 Cal. 316, 328.

The conclusion from the foregoing considerations, is that the demurrer should be sustained, and it is so ordered. Pursuant to the suggestion above made, the complaint may be amended *nunc pro tunc*, and an amended complaint should be filed, so that the case may be regarded as fully determined on its merits—particularly for purposes of appeal.

(Sgd.) CHAS. F. CLEMONS, Judge U. S. District Court.

[Endorsed]: No. 86. (Title of Court and Cause.) Decision Sustaining Demurrer of Defendant to Complaint. Filed Dec. 9, 1916, at 10 o'clock and 10 minutes A. M. (Sgd.) George R. Clark, Clerk. [30]

In the District Court of the United States, in and for the District and Territory of Hawaii.

S. M. KANAKANUI, WILLIAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

VS.

## UNITED STATES OF AMERICA,

Defendant.

## Judgment.

This cause having come before the Court to be heard upon a demurrer to the complaint, and the Court having heard the arguments of counsel, and having read their briefs, and having filed an opinion in writing in favor of the defendant, and plaintiffs having amended their original complaint in accordance with the order of this court *nunc pro tunc*, to include an allegation of a claim based on a taking of property under the Constitution or on a contract express or implied, in order that the case may be fully determined upon its merits; THEREFORE,

IT IS ORDERED, ADJUDGED AND DE-CREED: That the demurrer be sustained and that judgment be entered for the defendant and against the plaintiffs, and that the plaintiffs take nothing. The United States of America.

31

DATED, Honolulu, T. H., December 14, 1916. By the Court:

(Sgd.) GEORGE R. CLARK,

Clerk.

O. K.—(Sgd.) S. C. HUBER, U. S. Atty.

To the Clerk:

Let the foregoing Judgment be entered.

(Sgd.) C. F. C.,

Judge. [31]

[Endorsed]: No. 86. (Title of Court and Cause.) Judgment. Entered in J. D. Book 3, at folio #19. Filed Dec. 14, 1916, at 10 o'clock and 20 minutes A. M. (Sgd.) George R. Clark, Clerk. [32]

In the District Court of the United States, in and for the District and Territory of Hawaii.

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

PETITION FOR WRIT OF ERROR AND AL-LOWANCE.

ASSIGNMENT OF ERRORS.

WRIT OF ERROR.

CITATION ON WRIT OF ERROR.

BOND ON WRIT OF ERROR.

CASTLE & WITHINGTON,
Attorneys for Plaintiffs. [33]

In the District Court of the United States, in and for the District and Territory of Hawaii.

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

# Petition for Writ of Error and Allowance.

S. M. Kanakanui, William R. Castle, and William R. Castle, as trustee for said S. M. Kanakanui, petitioners in the above-entitled cause, feeling themselves aggrieved by the decision and judgment sustaining the demurrer to their complaint and denying their claim for damages, and complaining that there is manifest error to the damage of the petitioners in the same, come now, by Messrs. Castle & Withington, their attorneys, and petition said court for an

The United States of America.

35

order allowing said petitioners to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the petitioners shall give and furnish upon said writ of error, and that, upon the giving of such security, all further proceedings in this court be suspended [34] and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

Dated, Honolulu, T. H., December 23, 1916.

(S.) CASTLE & WITHINGTON.

Attorneys for Petitioners.

Allowed; and the amount of bond on said writ of error is hereby fixed at \$300.

(Sgd.) CHAS. F. CLEMONS, Judge. [35]

In the District Court of the United States, in and for the District and Territory of Hawaii.

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

# Assignment of Errors.

Now come the above-named plaintiffs, S. M. Kanakanui, William R. Castle, and William R. Castle, as trustee for said S. M. Kanakanui, and say that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

- 1. That the said Court erred in sustaining the demurrer of the respondent to the complaint of the plaintiffs as amended, and in ordering judgment for the respondent.
- 2. That the said Court erred in entering judgment for the respondent and against the plaintiffs.
- 3. That said Court erred in holding that the cause of action set forth is not one provided for in the act of March 3, 1887.
- 4. That the said Court erred in holding that the claim [36] set forth is not one founded upon the Constitution of the United States.
- 5. That the said Court erred in holding that said claim does not rise under a law of Congress.
- 6. That the said Court erred in holding that the complaint does not set forth a claim against the United States on a contract express or implied.

Dated, Honolulu, T. H., December 23, 1916.

(S.) CASTLE & WITHINGTON, Attorneys for Plaintiffs. [37] In the District Court of the United States in and for the District and Territory of Hawaii.

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

#### Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable CHARLES F. CLEMONS and the Honorable HORACE W. VAUGHAN, Judges of the United States District Court for the District and Territory of Hawaii, GREET-ING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before you, in the case of S. M. Kanakanui, William R. Castle, and William R. Castle as Trustee for said S. M. Kanakanui, Plaintiffs, v. United States of America, Defendant, a manifest error has happened, to the great prejudice and damage of said petitioners, S. M. Kanakanui, William R. Castle, and [38] William R. Castle as Trustee for said S. M. Kanakanui, as is said and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said circuit thirty days after this date, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS, The Honorable EDWARD DOUG-LASS WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of December, A. D. 1916.

Attest my hand and seal of the United States District Court in and for the District and Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal] (Sgd.) GEORGE R. CLARK,

Clerk, United States District Court in and for the District and Territory of Hawaii.

Allowed this 26th day of December, 1916. (Sgd.) CHAS. F. CLEMONS,

Judge of the District Court of the United States in and for the District and Territory of Hawaii.

In the District Court of the United States in and for the District and Territory of Hawaii.

October, A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

### Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America to the United States of America and to the Honorable S. C. HUBER, United States District Attorney for the District and Territory of Hawaii, its Attorney, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the United States District Court in and for the District and Territory of Hawaii, wherein S. M. Kanakanui, William R. Castle, and William R. Castle as [40] trustee for said S. M. Kanakanui are plaintiffs, and you are defendant in error, to show cause, if any there

be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable EDWARD DOUG-LASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 26th day of December, 1916, and of the United States the One Hundred and Fortieth.

## CHAS. F. CLEMONS,

Judge of the District Court of the United States in and for the District and Territory of Hawaii.

[41]

In the District Court of the United States, in and for the District and Territory of Hawaii.

October A. D. 1916, Term.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for Said S. M. KANAKANUI,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

### Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That S. M. Kanakanui, William R. Castle and William R. Castle, as Trustee for said S. M. Kanakanui, as principals, and Henry G. Winkley, as Surety, are held and firmly bound unto the United States of

America in the penal sum of three hundred dollars for the payment of which, well and truly to be made to said United States of America, we bind ourselves and our respective heirs, executors, administrators, successors or assigns firmly by these presents.

THE CONDITION of the above obligation is such that

WHEREAS, on the 23d day of December, 1916, the above bounden principals sued out a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from that certain judgment made and entered in the above-entitled court and cause on the 14th day of December, A. D. 1916, by the Honorable Charles F. Clemons, Judge of said court.

NOW, THEREFORE, if the said principals shall prosecute their [42] said writ of error to effect and answer all damages and costs if they fail to sustain their said writ of error, then this obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF, the said S. M. Kanakanui, William R. Castle, and William R. Castle as trustee for said S. M. Kanakanui, principals, and Henry G. Winkley, Surety, have hereunto set their hands this 23d day of December, 1916.

- (S.) WILLIAM R. CASTLE,
- (S.) WILLIAM R. CASTLE, Trustee,
  Principals.
- (S.) HENRY G. WINKLEY,

Suretv.

The foregoing bond is approved:

(Sgd.) CHAS. F. CLEMONS,

Judge, United States District Court, Territory of Hawaii. [43]

[Endorsed]: No. 86. (Title of Court and Cause.) Petition for Writ of Error and Allowance. Assignment of Errors. Writ of Error. Citation on Writ of Error. Bond on Writ of Error. Filed Dec. 26, 1916. (Sgd.) George R. Clark, Clerk. [44]

In the District Court of the United States, in and for the District and Territory of Hawaii.

No. 86.

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustee for said S. M. KANAKANUI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America, District of Hawaii,—ss.

I, George R. Clark, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 45, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on writ of error and one (1) order extending time to transmit record on appeal.

I further certify that the cost of the foregoing transcript of record is \$13.65, and that said amount has been paid to me by the appellants.

1N TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 31st day of January, A. D. 1917.

[Seal] GEORGE R. CLARK, Clerk, United States District Court, Territory of Hawaii. [45]

[Endorsed]: No. 2935. United States Circuit Court of Appeals for the Ninth Circuit. S. M. Kanakanui, William R. Castle and William R. Castle, as Trustee for said S. M. Kanakanui, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Hawaii.

Filed February 8, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk.



## **United States Circuit Court of Appeals**

#### FOR THE

#### NINTH CIRCUIT

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE as Trustee for said S. M. Kanakanui,

Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

#### BRIEF FOR PLAINTIFFS IN ERROR

DAVID L. WITHINGTON, Attorney for Plaintiffs in Error.

WILLIAM R. CASTLE,
W. A. GREENWELL,
ALFRED L. CASTLE,
of Counsel.





#### No. 2935

# United States Circuit Court of Appeals for the Ninth Circuit

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE as Trustee for said S. M. Kanakanui,

Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

#### BRIEF FOR PLAINTIFFS IN ERROR

#### STATEMENT OF THE CASE.

This is a writ of error to review a judgment of the United States District Court for the Territory of Hawaii, sitting as a court of claims under the Act of March 3, 1887 (24 Stat. 505), the Tucker Act so called, in which the plaintiffs alleged that their land had been condemned in an action brought in the same court by the United States of America by a final judgment September 7, 1911; that the United States suffered the judgment to remain unpaid and claimed under the same for two years, and that by reason of the premises the plaintiffs were entitled to recover damages, amounting in all to \$6,164.85,

"upon a claim founded upon the Constitution of the United States, upon the laws of Congress, upon a contract express or implied, and for their damages in a case not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; and they further allege that they are entitled to recover also against the United States by reason of the provisions of Section 505 of the Revised Laws of Hawaii, 1905, now Section 676 of the Revised Laws of Hawaii, 1915, and pursuant to said Constitution and laws."

A demurrer was interposed which was sustained by the court below in a careful opinion, on the ground that Section 676 is substantive law and not procedure and therefore not adopted by the statute adopting local procedure, that within the Tucker Act there was no taking of property for which compensation is due and for which there is any contract express or implied to reimburse, and that the claim for damages sounding in tort is expressly disallowed by that Act.

#### CLAIM OF THE PLAINTIFFS.

Plaintiffs claim under Section 676 as follows:

"Sec. 676. Payment of judgment, penalties. The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure so to do all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed more than thirty days after final judgment, then interest shall be added at the rate of seven per cent. per annum. Such payment shall be made to the

clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court, reasonable expenses and such damage as may have been sustained by him by reason of the bringing of the action."

on the ground that the United States having brought this action and secured the condemnation of the plaintiffs' land, in accordance with the laws of the Territory of Hawaii as provided by the Act of Congress, and procured the entry of a judgment, under which judgment by virtue of the section it acquired the right to take the land and to delay payment for two years, and having during those two years claimed the right to the property under what the court below calls an option, and having tied it up for the two years under this cloud and prevented its disposition, the United States is liable for the consequences of its voluntary act in taking advantage of the Hawaiian statute. The complaint shows the item of damages. As a matter of fact, we think it would be admitted by the Government that the plaintiffs' damages, including those for which it apparently has no redress, would be more nearly \$20,000 under the very peculiar circumstances of this case; but the amount of damages is immaterial in this form.

The claim rests in law on three different grounds, which are not exclusive of each other, all of which grounds Congress has made the basis of action under the Tucker Act, and waived the immunity of the United States to suit, viz:

"All claims founded upon the Constitution of the United States or any law of Congress, \* \* \* or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

#### These grounds are:

- (a) The claim is founded upon the 5th Amendment to the Constitution of the United States, which provides:
- "No person shall \* \* \* be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."
- (b) The proceeding was prosecuted under the Act of Congress of August 18, 1890, for the condemnation of sites for fortifications and coast defense as follows:

"Hereafter the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement, by condemnation, of any land, or right pertaining thereto, needed for the site, location, construction or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted."

Our claim is that having brought it under an Act of Congress providing that it should be prosecuted in accordance with the laws of the Territory of Hawaii, Section 676 of the Revised Laws of Hawaii, 1915, applies; and,

(c) The claim is founded upon an express contract on the part of the United States made by law to pay the sums provided to be paid by Section 676 in case it elects, as it has done, to take advantage of the section, or if not on an express contract, then upon an implied contract to pay the sums provided therein or the reasonable damages suffered by the owner, based upon having received the advantage of the provision, or else—and we are inclined to think this the true solution—upon a quasi-contract based on the statutory obligation incurred by reason of having taken the benefit of the statute.

#### ARGUMENT.

I.

WHEN THE UNITED STATES CONSENTS TO A SUIT AGAINST IT OR ASSUMES OBLIGATIONS, THE COURT IS BOUND TO DECIDE IN THE SAME MANNER AS BETWEEN MAN AND MAN ON THE SAME SUBJECT.

This was decided in an early and leading case.

"By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man, on the same subject matter."

So when the United States assumes a claim against a State, although the United States does not ordinarily pay interest, it must pay interest as the State would pay it.

United States v. McKee, 91 U. S. 442.

It is liable for funds fraudulently obtained, as an individual.

United States v. State Nat. Bank, 96 U. S. 30. It must pay upon a quantum meruit where an im-

plied contract arises.

Clark v. United States, 95 U.S. 539.

"To constitute such a contract, there must have been some consideration moving to the United States."

Knote v. United States, 95 U.S. 149.

It has been said that the United States stands in a more favored position than the ordinary suitor and does not pay interest and costs to the individual, although the individual may be obliged to pay to it.

United States v. Verdier, 164 U.S. 213.

Yet the same court has declared that the rule that the United States does not pay interest is not uniform.

United States r. McKee, ubi supra.

So under the Tucker Act there is discretion to award costs, which discretion is usually exercised.

United States v. Harmon, 147 U.S. 269.

In actions in the Supreme Court of the United States, where a State is a party, there is not only power to award costs, but it is said:

"there is no reason why the plaintiff should not suffer the usual consequences of failure to establish its case."

> Missouri v. Illinois, 202 U. S. 598. Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 460.

#### II.

IT IS ADMITTED THAT THE PLAINTIFFS HAVE SUFFERED DAMAGE, FOR WHICH THEY HAVE RECEIVED NO JUST COMPENSATION.

The court below said:

"by the judgment of condemnation the Government virtually acquired an option to purchase the plaintiffs' interests for a certain sum of money, \* \* \* It is apparent that the plaintiffs have suffered damage and have been put to expense by reason of the condemnation suit." (Tr., p. 22.)

and

"The plaintiffs have been prejudiced, it is true, and the more prejudiced as the proceedings advanced to the judgment of condemnation and of valuation, but this is merely damnum absque injuria." (Tr., p. 25.)

The damage is admitted, but it is said to be damnum absque injuria because there was no "taking" and the advantage acquired by the Government was not "property."

Based on this damage, and in some cases going so far as to provide for the damages suffered merely by bringing the suit, a number of the States have enacted statutes for indemnity, among them Massachusetts, Minnesota, Iowa, Pennsylvania and New Jersey, construed in the following cases:

Ford v. Board of Park Commissioners, 148
Ia. 1, 126 N. W. 1030, 23 Ann. Cas. 940.

Drury v. Boston, 101 Mass. 439.

Whitney v. Lynn, 122 Mass. 338.

Minnesota R. Co. v. Whitworth, 32 Minn. 452, 21 N. W. 476.

Re Pittsburgh, 243 Pa. 392, 90 Atl. 329, 52 L. R. A. (N. S.) 262.

In re Port Reading R. Co., 75 N. J. L. 430, 68 Atl. 219.

Walsh v. Board of Education of Newark, 73 N. J. L. 643, 64 Atl. 1088.

The Hawaiian statute under consideration is unlike most of these statutes which provide for discontinuance. It provides for another case, namely, where the Government elects to take advantage of the judgment and to claim under it for two years, a new and valuable right not given by the mere authority of condemn.

There are cases in which it was held that an unreasonable delay in prosecuting render the plaintiff liable to damages suffered by the defendant, but the rule would seem to be, as quoted by the court below from Lewis on Eminent Domain, that the plaintiff can dismiss within a reasonable time after the fixing of value. Some jurisdictions fix at twenty days and others at thirty days.

It has been suggested that even in this case it is within the discretion of the court to impose as a condition the payment of costs and damages.

Southern Pacific R. Co. v. Reis Estate Co., 15 Cal. App. 216; 114 Pac. 808, 810.

We repeat again, the damage which we claim here is damage incurred by the exercise by the Government of a right after the fixing of the price and the condemnation by claiming under the condemnation two years before they elect not to pay, a right which they would not have but for the procedure provided by this statute.

#### III.

THIS DAMAGE WAS NOT DAMNUM ASBQUE INJURIA, FOR IT WAS NOT SUFFERED IN THE COURSE OF THE ORDINARY PROCEEDINGS IN A COURT OF JUSTICE, IN COMMON WITH THE PUBLIC GENERALLY, BUT BY REASON OF RIGHTS ACQUIRED UNDER THE JUDGMENT OF CONDEMNATION, UNDER WHICH THE UNITED STATES CLAIMED AND THE BENEFITS OF WHICH IT RECEIVED.

The judgment is a "final judgment" (Sec. 676) and "rights" are obtained under it, for on the failure to pay within two years "all rights which may have been obtained by such judgment shall be lost to the plaintiff," and it bears interest "thirty days after final judgment." It is, moreover, a part of the procedure and is followed by a final order of condemnation.

"When all payments required by the final judgment have been made, the court shall make a final order of condemnation, \* \* \* and thereupon the property described shall vest in the plaintiff."

Section 677, Revised Laws of Hawaii, 1915.

This is not a case of damnum absque injuria, and "temporary inconvenience to private parties, in common with the public in general" (Hamilton v. Vicksburg, Shreveport & Pacific R. R. Co., 119 U. S. 280), such as the liability of every one to suit and to the incidental expenses in defending the action. Whether such damages are deemed compensated in the judgment, as was said in Shoemaker v. United States, 147 U.S. 282, 321, or whether they are damnum absque injuria, is immaterial; and it is also immaterial whether there is any right to recover when the dismissal is after the ascertainment of the amount and before final judgment. In this case final judgment was entered and a claim of rights made under it for two years. (Tr., p. 8.) It is also immaterial whether we can recover according to the provision of the Hawaiian statute, or whether recovery is to be had upon a quantum meruit.

No case cited in the learned and exhaustive opinion of the court below meets this case. Carlisle v. Cooper, 64 Fed. 472; Downs v. Reno, 124 Pac. 582, and the other cases cited, aside from the two from Connecticut hereafter referred to, deal with costs on dismissal before final judgment, whereas final judgment was entered in this case and the Government obtained its benefit and claimed under it for two

years. It is worthy of note that the opinion in Carlisle v. Cooper does not notice United States v. Engeman, 46 Fed. 898, in the same district, where a different result was reached. In all these cases, including the Connecticut cases, as is said by the court below, "The proceedings were only preliminary to a taking." (Tr., p. 21.)

Thus in Lamb v. Schottler, 54 Cal. 319, it is said:

"It is obvious that the public had acquired no new right under these proceedings before the repeal of the act." (Tr., p. 25.)

There the State immediately expressed its dissatisfaction. Up to that time (the payment), "he (the owner) parts with nothing, and the public receives nothing." (Tr., p. 24.)

#### IV.

FOR THIS DAMAGE THE PLAINTIFFS ARE ENTITLED TO RECOVERY: (a) UNDER THE CONSTITUTION; (b) BY VIRTUE OF THE ACT OF CONGRESS ADOPTING THE PROCEDURE; AND (c) IF NOT ADOPTED AS A PART OF THE PROCEDURE, THEN UNDER AN IMPLIED CONTRACT, HAVING RECEIVED THE BENEFITS, TO PAY ACCORDING TO THE HAWAIIAN ACT, OR ELSE UPON A QUANTUM MERUIT.

(a) Plaintiffs are entitled to just compensation, their private property having been taken for public use.

"There are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken."

Pumpelly v. Canal Co., 13 Wall. 166, 20 L. Ed. 557, 561.

Langford v. United States, 101 U. S. 341, 25 L. Ed. 1010.

So the filing of a map showing that the land was set aside for an avenue has been held to be within the constitutional provisions.

Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543.

See, also,

Peabody v. United States, 231 U. S. 530, 58 L. Ed. 350.

Richards v. Washington Terminal Co., 233 U. S. 546, 58 L. Ed. 1088.

Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739.

In the Monongahela Bridge Company case, in which it was held that the damage was one common to others and incurred in the exercise of a police power, the court said:

"Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. Ed. 435, 443.

A similar provision in Section 1 of Article 14 of the Amendments applicable to the States,

"Nor shall any State deprive any person of life, liberty or property without due process of law."

has been held to invalidate an ordinance by which two-thirds of the owners of abutting property may establish a building line at their discretion, where the ordinance provided no compensation for the owner.

Eubank v. Richmond, 226 U. S. 137, 57 L. Ed. 156.

Where an owner of land claimed that his property had been taken by the establishment of a building line on all property fronting on a certain boulevard, the court said:

"Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction protanto of property."

St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861; 21 L. R. A. 226, 228.

(b) The provisions of the Revised Laws of Ha-

waii have been adopted by Congress as a part of the law.

The Act of Congress directs such proceedings "to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted." In prosecuting the condemnation suit in accordance with the laws of the Territory of Hawaii relating to the condemnation of property, a final judgment was entered which is provided for by Section 676 of the Revised Laws, which section provides the procedure for payment, the rights acquired under the judgment by both parties, and this is followed by the final order of condemnation upon the payment of the judgment provided for in Section 677, and by Section 678 possession is authorized pending the proceedings, the money being paid into court. All these laws clearly regulate the proceedings for the condemnation of property, and the Government cannot acquire rights under them without the corresponding liability to pay.

As said by Mr. Justice Field, the representation of the United States by its attorneys

"constitutes a sufficient waiver of the immunity. The legislation amounts to a consent to such proceedings as the state laws authorize for the condemnation of property in which the United States are interested. \* \* \* the legislation is, in legal effect, little more than a declaration that the United States will pay the compensation which may be awarded

\* \* \* in proceedings taken in accordance with its laws."

United States v. Jones, 109 U. S. 513, 27 L. Ed. 1015.

#### The proceedings

"include all the regulations and steps incident to that process, from its commencement to its termination as prescribed by the State laws; so far as they can be made to apply to the federal courts; as this court held in Wayman v. Southard (10 Wheat. 27, 28), and, also, in Beers v. Houghton (9 Peters), United States v. Knight (14 Peters), Amis v. Smith (16 Peters 312)."

Duncan v. Darst, 1 How. 301, 11 L. Ed. 139, 141.

Beers v. Haughton, 9 Pet. 329, 9 L. Ed. 145. United States v. Knight, 14 Pet. 301, 10 L. Ed. 465.

A "proceeding" is defined as the instrument whereby the party injured obtains redress for wrongs committed against him, either in respect to his personal contracts, his person, or his property.

Sanford v. Sanford, 28 Conn. 6.

It includes any step to be taken in a cause which is authorized by law in order to enforce the rights of the parties.

State v. District Court, 33 Mont. 359, 83 Pac. 641.

Ex parte McGee, 33 Ore. 165, 54 Pac. 1091.

"The word "proceeding" includes the form and manner of conducting judicial business before a

court or judicial officer, regular and ordinary process in form of law; including all possible steps in an action from its institution to the execution of judgment. In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object.' 23 Am. & Eng. Ency. of Law, 155."

Greenleaf v. Minneapolis, St. P. & S. S. M. R. Co. (N. D. 1915), 151 N. W. 879, 882.

It has been expressly decided, in a case very much in point, that a similar provision comes under the term "procedure."

"An act to regulate the procedure in conducting actions at law would undoubtedly cover provisions for the discontinuance of actions, although the purpose of every action is to ascertain and compel the payment of a debt or of damages."

The court required the payment of costs, expenses and counsel fees to the landowner upon abandonment.

> In re Port Reading R. Co., 75 N. J. L. 430, 68 Atl. 219, 221.

It cannot be claimed that Congress intended to adopt the part of the section which gives the United States a right, which it has availed of, to wait two years before determining whether it will take the property or not, but that it did not intend to adopt the provision that if it wait these two years and does not take, it must pay the damages. This is not a question of subjecting a sovereignty to costs or to

interest. The question is whether the Act of Congress in providing that the Government, in following the procedure, should acquire this right for two years intended to deprive the owner of the corresponding obligation, which is an integral part of the entire procedure. This is inconceivable.

The provisions of the State law only give way when they are "inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress."

Luxton v. North River Bridge Co., 147 U. S. 337.

Chappell v. United States, 160 U.S. 499.

In Carson v. Hartford, 48 Conn. 68, and Stevens v. Danbury, 53 Conn. 9, 22 Atl. 1071, damages were denied because the act contemplated the right of the city to withdraw after the ascertainment of the damages, and in each case the city withdrew within a reasonable time. In the latter case it is said:

"There is generally a provision in such resolutions that the payment shall be made, if at all, within a limited time; and there ought properly to be such a provision in every case."

In the former case, after referring to two of the numerous Maryland cases sustaining the right to recover, and two Louisiana cases to the same effect, cites from *Norris v. Mayor*, 44 Md. 598, as follows (the italics those of the Connecticut court):

"When the assessments have all been finally settled, the city then can fairly exercise the election to abandon the enterprise or pay the assessments and proceed with the work. For losses to owners *subsequently occasioned* through failure of the city authorities thus to *abandon or pay* it is, we think, just and right that the city should be held liable, and this we understand to be the effect of the decision in Graff's Case."

Carson v. Hartford, ubi supra.

(c) If Congress has not adopted this provision as a part of the procedure, then there is an implied contract on the part of the Government to pay.

In the great case of *Ogden v. Saunders*, Chief Justice Marshall, in discussing the proposition that the obligation of a contract rests on the express or implied assent of the parties, and not on positive law, says:

"A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations which, as honest, fair, and just men, they ought to have made."

Ogden v. Saunders, 12 Wheat. 213, 341.

"Implied contracts are such as reason and justice dictate from the nature of the transaction, and which, therefore, the law presumes that every man undertakes to perform."

2 Story, Const., Sec. 1377.

An action of *indebitatus assumpsit* is founded on an implied promise which the law imputes, to fulfill an obligation based on a duty.

Bailey v. N. Y. C. and H. R. R. R. Co., 22 Wall. 604.

But as Mr. Justice Story has said:

"The promise is only the form in which the law announces its own judgment upon the matter of right and duty and remedy; and under such circumstances any argument founded upon the form of the action, that it must arise under or in virtue of some contract, is disregarded, upon the maxim qui haeret in litera, haeret in cortice."

Cary v. Curtis, 3 How. 236, 255.

Or, as is sometimes said, the tort may be waived and the law will imply a promise on which suit can be brought.

Brainard v. Hubbard, 12 Wall. 1. Fiedler v. Curtis, 2 Black. 461.

If it is not held that the United States has expressly promised to pay what the law imposes as its duty to pay, it clearly, having received the benefit, must fulfill the obligation. The foundation of this doctrine is found in the civil law doctrine that one man cannot enrich himself at the expense of another without being liable to repay.

#### V.

THE PLAITIFFS ARE ENTITLED TO RECOVER UPON A QUASI-CONTRACT, VIZ: A STATUTORY OBLIGATION VOLUNTARILY INCURRED. A CLAIM WHICH DOES NOT SOUND IN TORT.

The true solution of the matter is that the claim of the plaintiffs comes within the Tucker Act, since it is a statutory obligation of the United States founded on an adequate consideration, and not sounding in tort. The court below is clearly in error in assuming that there has been anything tortious in the conduct of the United States. They were pursuing their just right in accordance with the procedure which had been adopted by Congress, and, thus proceeding, were subject to the reciprocal obligation which the statute imposed, and that obligation is in the nature of a quasi-contract.

In an obligation like the half pilotage act, which had been before the Supreme Court of the United States, the court said of the recovery:

"It was not a penalty that was recovered. There was a tender of services upon which the law raised an implied promise to pay the amount specified in the statute."

Ex parte McNeil, 13 Wall. 236.

Mr. Justice Field says, in a case where it was held that the repeal of the act did not repeal the right of recovery, that this "transaction is regarded by the law as a quasi-contract" and stands on substantially similar grounds to the implied contract which the law raises where one has incurred an obligation or duty.

Pacific M. S. S. Co. v. Jolliffe, 2 Wall. 450. Keener on Quasi-Contracts, p. 16. Street on Legal Liabilities, Vol. II, Ch. XXI.

It is true that in cases like *Louisiana v. New Orleans*, 109 U. S. 286, it is said that such a quasi-con-

tract, where it sounds in tort is not protected by the clause of the Constitution forbidding any State to enact a law impairing the obligation of a contract, but this obligation does not sound in tort but rests upon the exercise by the Government of an undoubted right, nor does any question arise under that clause.

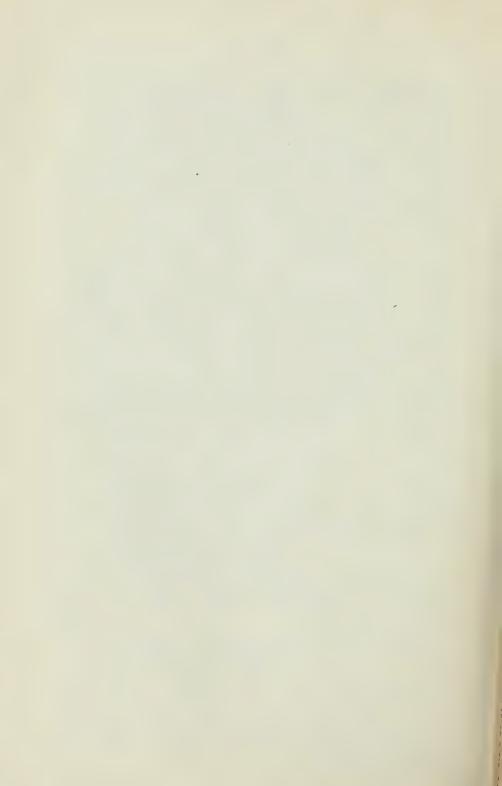
#### CONCLUSION.

In conclusion, we submit that within the express language of the Tucker Act our claim is founded upon the Constitution, since we have been deprived of the full use of our property, without compensation other than that provided in the Act, that it does not sound in tort, and that the plaintiffs would be entitled to the redress demanded under the Hawaiian statute against the United States in a court of law if the United States were suable; and we respectfully request that the judgment be reversed and the court below directed to overrule the demurrer.

Dated, Honolulu, T. H., April 12, 1917.

DAVID L. WITHINGTON, Attorney for Plaintiff in Error.

WILLIAM R. CASTLE,
W. A. GREENWELL,
ALFRED L. CASTLE,
of Counsel.



IN THE

# **United States Circuit Court of Appeals**

For the Ninth Circuit

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustees for Said S. M. KANAKANUI,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

### BRIEF OF DEFENDANT IN ERROR

Upon Appeal from the United States District Count of the Territory of Hawaii.

MAY 2 1 1017

JOHN W. PRESTON, D. Monckton,
United States Attorney
Clerk.
For the Northern District of California,

ED F. JARED,

Asst. United States Attorney
For the Northern District of California.

Attorneys for Defendant in Error.

Filed this day of May, 1917.

FRANK D. MONCKTON, Clerk,

By...... Deputy Clerk.



#### IN THE

## United States Circuit Court of Appeals

For the Ninth Circuit

S. M. KANAKANUI, WILLIAM R. CASTLE, and WILLIAM R. CASTLE, as Trustees for Said S. M. KANAKANUI,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

#### BRIEF FOR DEFENDANT IN ERROR.

#### STATEMENT OF THE CASE.

This is an action at law brought in the United States District Court of the Territory of Hawaii, to recover damages from the United States arising from proceedings to condemn certain land of the plaintiffs.

The condemnation suit was brought under the authority of the Act of August 18, 1890 (26 Stats. at Large, p. 316) which reads in part:

"The Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement, by condemnation, of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted."

The plaintiff's grounds of recovery are based, first: upon the Fifth Amendment of the Constitution of the United States; second, upon a contract, expressed or implied; and third: under a law of Congress, which it is insisted embraces the condemnation laws of the Territory of Hawaii, and particularly Section 505 of the Revised Laws of Hawaii, now Section 676 of the Laws of 1915, which read as follows:

"The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure so to do all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed more than thirty days after final judgment, then interest shall be added at the rate of seven per cent. per annum. Such payment shall be made to the clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court, reasonable expenses and such damage as may have been sustained by him by reason of the bringing of the action."

Plaintiffs' complaint alleges that on September 7, 1911, a decree was entered in those proceedings condemning the right, title and intrest of the plaintiffs for the public use of the United States in ordering that their right, title and interest should vest in the United States upon the payment of an award of Five Thousand Dollars (\$5,000) damages; that no part of this award has been paid and the two years' period fixed by the Hawaiian Statute within which such award should be paid has elapsed, and under the statute all rights obtained by the United States in the above decree have been lost; and that "by reason of the law and particularly by reason of section 505 of the Revised Laws of Hawaii, 1905," the plaintiffs "are entitled to recover their costs of court, reasonable expenses and such damages as they have sustained by reason of the bringing of said action for condemnation."

The specific amounts claimed under complaint were \$1,100 for attorney's fees in the preparation and trial of the condemnation suit; \$64.85 for witness fees and other expenses, \$5,000 damages for the

loss of the use of the condemned property, and interest on the award of \$5,000 at seven per cent per annum.

The Government interposed a demurrer to the complaint setting up several grounds wherein its principal objection was that the facts set out in the complaint were insufficient to show a substantial cause of action. The demurrer was sustained and the judgment was entered in favor of the Government and it is now before this Court upon a writ of error to review the said judgment.

#### ARGUMENT.

There being no facts set out in the complaint sustaining an allegation of an expressed contract, or that the land was taken, grounds One and Two upon which recovery was based must fail.

The Government concedes that if the land was taken either in whole or in part, it would be obligated upon the principle that the Government, by the very act of taking impliedly, has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require.

U. S. vs. Great Falls Mfg. Co., 102 U. S. 645, 656,

U. S. vs. Lynah, 188 U. S. 445, and 465.

The only attempt of an allegation in the complaint of the taking of the land by the Government is the averment that a judgment was entered in the condemnation proceedings.

Mr. Lewis in his work on Eminent Domain, Section 655 (3rd Ed.) says:

"The weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceeding for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment, the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded."

In a very recent case, *U. S.* vs. *W. R. Cress*, (decided March 12, 1917), the Supreme Court, speaking through Mr. Justice Pitney, said:

"It is the character of the invasion, not the amount of damages resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

If a condemnation suit for the purpose of fixing the price of land sought is a direct invasion of the land of the plaintiff, then the defendant would be liable for damages. If not, whatever damage is brought out by such proceedings would be consequential and no right to compensation would exist.

"Taking under the power of eminent domain, may be defined as entering upon private property for more than a momentary period, under the warrant of color of legal authority, diverting it to a public use or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof."

10 R. C. L. 66

Fruth vs. Charleston, 84 S. E. 105

L. R. A. 1915, C 981.

It was said in the case of Lamb vs. Schottler, et al, 54 Cal. 319, at page 327:

"The right of the State to take private property for public use in no sense depends upon any contract between the owner and the public. Nor is there any vested right to compensation, until the property is taken; nor is the Government under any obligation to take the property if the terms when ascertained are not satisfactory."

The Appellate Court of California, said in the case of *Los Angeles* vs. *Gager*, 10th Cal. Appellate, page 382:

"Until a citizen is deprived of compensation of property sought to be condemned, his right to the use and acknowledgment thereof as it stood at the time of commencing the action is in no wise abridged. Therefore, it cannot, in a legal sense be said that he is damaged until the actual taking of the property."

If this theory was not true, the avenues of public improvement would almost be blockaded for the Government could not afford to ascertain the value of the property through condemnation for public improvement if it was compelled to take the property at unreasonable prices or forced to pay damages for not taking it.

The Court below in its very learned and comprehensive opinion, said upon this subject:

"There was certainly no taking of the particular property sought to be condemned. The proceedings were only preliminary to a taking. See U. S. vs. Dickson, 127 Fed. 775; Lamb vs. Schlottler, 54 Cal. 319, 327; Stevens vs. Borough of Danbury, 22 Atl. 1971; Carson vs. City of Hartford, 48 Conn. 68, 87, 88 and other cases discussed hereinbelow."

I have not been able to find, nor has the plaintiffs' counsel in his very exhaustive search, been able to show any statute or any case in which the Government would be held liable for damages in not taking the initiative steps to set aside or abandon a judgment in condemnation of lands.

"The power to inflict damage upon private property without rendering compensation is an extreme exercise of the sovereign powers not to be assumed to have been granted to private parties in the absence of specific legislative enactment; and so, power granted to private corporation to construct a public work authorizes no injuries not necessarily incident to the

construction of such work. For other injuries occasioned, even though there be an absence of negligence, the corporation is liable to the same extent as a private owner. THIS RULE, HOWEVER, HAS NO PERTINENCY TO A CASE WHERE THE GOVERNMENT ITSELF SEEKS, BY APPROPRIATE MEANS PLAINLY ADAPTED TO THE END, TO ACCOMPLISH FOR THE PUBLIC BENEFIT ANY OF THE OBJECTS CONFIDED TO ITS JURISDICTION."

10 R. C. L. 67

Benner vs. Atlantic Dredging Co.

134 N. Y. 156, 31 N. E. 328.

It is true that certain statutes of states hold individuals, corporations, and even the state itself liable to such damages. The state is held impliedly upon the theory that it is bound by the acts of its own legislature.

Deneed vs. Unverz Agt., 80 N. E. 321.

The word "taken", as used in the Fifth Amendment of the Constitution with the provision that just compensation must be made, means the property actually invaded and appropriated. A concrete example is found in the case referred to above, U. S. vs. W. R. Cress, in which the Court said:

"Where the Government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the Government is not directed to proceed to appropriate the title it takes way the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course it results from this that the proceeding must be regarded as an actual appropriation of the land including the possession, the right of possession and the fee."

I am unable to find any decision of the Supreme Court of the United States holding the Government liable except such physical invasion.

The Circuit Court of Appeals said in the case of U. S. vs. Dickson, 127 Fed. 775:

"No physical interference has been made with the property, nor has there been a taking of the same in any legal sense; and unless in some way unknown to the Court, the United States can be compelled to take the property at the owner's valuation, it is perfectly plain that these suits form no exception to the general rule."

So, as stated above, if there was no taking there could be no recovery under the Tucker Act relative to the Fifth Amendment, or to an implied contract.

While there is no direct allegation of an expressed contract in the plaintiffs' complaint, it is argued by plaintiffs that it was made so by law, that is, by the Act of Congress of August 18, 1890, wherein the said Act directed condemnation proceedings to be prosecuted in accordance with the local laws. For

this reason it is claimed that Section 505 of 1905 of the Revised Laws of Hawaii was incorporated in said Act and that the Government under that Section assumed the obligation that is here claimed.

While this feature of their claim will be met later on, I desire at this point to call the Court's attention to the case of *Lamb* vs. *Schottler*, 54 Cal., p. 327, in which the Court said:

"The Act provides (referring to the Eminent Domain Act) for the taking of private property for public use. When in the exercise of its sovereign right of eminent domain, the State takes the property of a person he has but one right that is given to him by the Constitution—the right to compensation before he is deprived of his property. The right to take his property in no sense depends upon any contract between him and the public. His assent is not required and his protestations of no avail, but under the Constitution his property cannot be taken until paid for. Up to that time he holds it as he always held it subject to the right of the State to take it for public use upon compensating him for it."

ABANDONMENT—It is insisted by the plaintiffs that the Government by not abandoning the condemnation suit within reasonable time after judgment, caused damages to plaintiffs. If this be true, the approximate cause of the damages was the wrongful act of the Government and no recovery could be made as such claim, as sounding in tort is expressly disallowed.

The Supreme Court of Illinois said in a case of *Chicago etc. Company against Chicago*, 143 Ill. p. 641, as follows:

"A municipal corporation seeking to condemn real estate for public use may, after the assessment of damages and judgment of condemnation, abandon the enterprise in aid of which the condemnation is sought and unless, within a reasonable time, the damages are paid and possession taken of the property condemned, the proceedings will be regarded as abandoned."

To the same effect is

Bensley vs. Mountain Lake Water Co., 13 Cal. 307, 317,

St. Louis etc. R. R. Co. vs. Tetters, 68 Ill. 144, 150,

Pool vs. Butler, 141 Cal. p. 53.

Nichols, in his work on Eminent Domain, Section 342, subject, Evidence of Abandonment, says:

"When the statutes specify a period within which compensation must be paid, possession, taking, or some other act done, the expiration of the period without the performance of the statutory requirement, constitutes an abandonment."

(Cite authorities)

"In the absence of such provisions abandonment may be inferred from failure to take possession and pay the damages within reasonable time."

(Cite several authorities.)

The third and last ground upon which the plaintiffs bases a recovery is under a law of Congress. It is argued by the plaintiffs as the condemnation suit was instituted under the said Act of August 18, 1890, that Section 505 which has been quoted above, was incorporated and made a part of the Act for the reason that it directed such proceedings to be prosecuted in accordance with the laws relating to suits for condemnation of property of states wherein the proceedings may be instituted.

The Court below said, correctly, I believe, (Trans. p. 20)

"The provision that 'such proceedings' are 'to be prosecuted' in accordance with the eminent domain laws, is merely a provision adopting local procedure—a provision not needed in view of the 'conformity' statute, Rev. Stat. Sec. 914, Judson vs. United States, 120 Fed. 637, 642-643; while, on the other hand, the provision of section 505 of the Revised Laws of Hawaii, 1905, allowing damages, expenses, and costs against the government is a provision of substantive law, rather than of procedure."

I do not think it could be logically contended but what the Federal Act relative to condemnation proceedings, wherein it directs a prosecution in accordance with the local law meant anything but a repetition or reassertion of the Conformity Act. This is the interpretation by the 2nd Circuit Court of Appeals in the case of *Carlisle* vs. *Cooper*, 64 Fed. p. 472 at p. 475. It was insisted in that case, in which the Government had abandoned the condemnation suit, that it should pay the cost and other actual expenses. The Court said:

"Congress could not have supposed that its remedial legislation would permit judgment against the Government for damages or costs. If any such suggestion had been made, it would have been met by the consideration that any attempt, in state codes or practice acts, to accomplish that result, would be nugatory legislation."

In other words, that part of the Federal Statute means, and only means, that you are to follow the adjective or remedial law relating to the local statutes and not the substantive, as here insisted by the plaintiffs.

I have been unable to find any decision in the Courts that place a different construction. It was said by the Supreme Court in the case of *Nudd* vs. *Burrows*, 91 U. S. p. 441, that the purpose of the statute was—

"To bring about uniformity in the law of procedure in the Federal and State Courts for the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common law pleadings forms and practice were adhered to, in the State Courts of the same district, the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both".

The Conformity Act does not apply where Congress has legislated.

Pentlarge vs. Kirby, 20 Fed. 899, Eastern vs. Hodges, 7 Biss. 324, McNutt vs. Bland, 2 How. 17, U. S. vs. Pings, 4 Fed. 715.

Congress has very specifically legislated upon the subject of costs against the Government. Section 152 of the Judicial Code which was re-enacted from the Tucker Act says:

"If the Government of the United States shall put in issue the right of the plaintiff to recover, the Court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the Clerk of the Court.

It was said in the case in re Williams, 120 Fed. p. 36 that

"In the absence of a statute providing for the allowance of counsel fees and expenses, it is the settled rule of national courts that none can be allowed." It was said in the case of Scully vs. U. S., 197 Fed. p 346 that

"No judgment for interest can be rendered against the Government unless interest has been provided for either in the contract or by statutes".

(With numerous citations.)

For these reasons we submit that the judgment of the lower court should be sustained.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,
For the Northern District of California,

ED. F. JARED,
Asst. U. S. Attorney,
For the Northern District of California,

Attorneys for Defendant in Error.



# United States

# Circuit Court of Appeals

For the Ninth Circuit.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Plaintiff in Error,

THE UNITED STATES OF AMERICA,

Defendant in Error.

# Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California,

Southern Division.





# United States

# Circuit Court of Appeals

For the Ninth Circuit.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Plaintiff in Error, vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

# Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California,

Southern Division.



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

to occur.j	Page
Arraignment and Plea of Defendant	9
Assignment of Errors	94
Attorneys, Names and Addresses of	1
Bill of Exceptions of Defendant	33
Bond Pending Decision Upon Writ of Error	113
Certificate of Clerk U.S. District Court to Tran-	
script of Record	120
Citation on Writ of Error	4
Demurrer to Indictment	11
EXHIBITS:	
Plaintiff's Exhibit No. 1—Charge Card Is-	
sued to J. B. Miller by Western Union	
Co	54
Plaintiff's Exhibit No. 3—Bill for Tele-	
grams for Month of November Issued	
to J. B. Miller	60
Plaintiff's Exhibit No. 4—Daily Cash Rec-	
ord of Western Union Telegraph Co	61
Indictment	$\epsilon$
Minutes of the Trial—November 21, 1916	20
Minutes of the Trial—November 22, 1916	24
Minutes of the Trial—December 4, 1916	31
Minutes of the Trial—December 12, 1916	32

$\mathbf{Index}.$	Page
Names and Addresses of Attorneys	. 1
Opening Statement on Behalf of the Prosecu-	-
tion	35
Order Allowing Bill of Exceptions and Making	g
Same Part of Record	. 90
Order Allowing Writ of Error	. 112
Order Extending Time to File Record and	l
Docket Cause to March 2, 1917	. 122
Order Overruling Demurrer	. 19
Order Substituting Attorneys, Withdrawing	ŗ
Plea of not Guilty and Allowing Demurrer	C
to Indictment	10
Petition for Writ of Error	91
Praecipe (Amended)	. 119
Presentation of Bill of Exceptions, Notice	9
Thereof and Stipulation for Settlement and	l
Allowance	. 89
Stipulation as to Correctness of Bill of Excep-	-
tions	. 90
TESTIMONY ON BEHALF OF THE GOV	-
ERNMENT:	
BENNETT, F. A	. 53
Recalled	70
BORDEAU, LOUISE	36
Cross-examination	
Recalled	. 69
Cross-examination	. 69
CLIFF, JULIAN EUGENE	
Cross-examination	53
COUSINS CHARLES H.	50

The United States of America.	111
Index.	Page
TESTIMONY ON BEHALF OF THE GOV	7_
ERNMENT—Continued:	
ESTUDILLO, ERNEST	. 48
Cross-examination	. 49
GERSHON, DAVE	. 47
Cross-examination	. 47
MOSEDALE, ARTHUR WILLIAM	. 53
NAYLOR, ETTA	. 67
Cross-examination	. 68
STANLEY, H. M	. 51
Cross-examination	. 51
STETZEL, MYRL	. 63
Verdict	

Writ of Error .....



## Names and Addresses of Attorneys.

For Plaintiff in Error:

ALFRED F. McDONALD, Esq., and JUD. R. RUSH, Esq., 600 Bryson Building, Los Angeles, California.

For Defendant in Error:

ALBERT SCHOONOVER, Esq., United States Attorney, Los Angeles, California.

ROBERT O'CONNOR, Esq., Assistant United States Attorney, Los Angeles, California.

CLYDE R. MOODY, Esq., Assistant United States Attorney, Los Angeles, California. [4\*]

In the District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

#### Writ of Error.

United States of America—ss.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Southern District of California, Southern Division, Greeting:

<sup>\*</sup>Page-number appearing at foot of page of original certified Transcript of Record.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, between James B. Simpson, indicted as James B. Miller, plaintiff in error, and the United States of America, defendant, in error, a manifest error hath happened to the great damage of said James B. Simpson, otherwise known as James B. Miller, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof in the said Circuit Court [5] of Appeals, to be then and there held that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUG-LASS WHITE, Chief Justice of the United States, the 15th day of December, 1916.

[Seal] WM. M. VAN DYKE,

Clerk of the United States District Court, Southern District of California, Southern Division.

By Chas. N. Williams, Deputy Clerk.

Allowed by

OSCAR A. TRIPPET,

Judge.

I hereby certify that a copy of the within Writ of Error was on the 15th day of December, 1916, lodged in the clerk's office of the United States District Court for the Southern District of California, Southern Division, for the said defendant in error.

#### WM. M. VAN DYKE,

Clerk of the United States District Court, Southern District of California, Southern Division.

By Chas. N. Williams, Deputy Clerk. [6]

In the District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

#### Citation on Writ of Error

United States of America, Southern District of California, Southern Division,—ss.

To the United States of America, and to ALBERT SCHOONOVER, U. S. Attorney for the Southern District of California, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Southern District of California, Southern Division, wherein James B. Simpson, indicted as James B. Miller, is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Los Angeles, California, in said District, this 15th day of December, 1916.

### OSCAR A. TRIPPET,

United States District Judge for the Southern District of California.

O. K.—CLYDE R. MOODY, Asst. U. S. Atty. [8]

[Endorsed]: No. 1098. In the United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff. vs. James B. Simpson, Indicted as James B. Miller, Defendant. Citation on Writ of Error. Received Copy of within Citation this 15th day of December, 1916. Clyde R. Moody, Asst. U. S. Atty., Attorney for Plaintiff. Filed Dec. 15, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [9]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1098—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant. [10]

#### Indictment.

In the District Court of the United States in and for the Southern District of California, Southern Division.

At a stated term of said court, begun and holden at the city of Los Angeles, county of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and sixteen,—

The grand jurors of the United States of America, chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That James B. Miller, whose full and true name, other than as herein stated, is to the grand jurors unknown, heretofore, to wit, on or about the 26th day of November, in the year of our Lord one thousand nine hundred and fifteen, within the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly unlawfully and wilfully persuade, induce and entice a certain woman, to wit, one Vida White alias Vida Rogers, whose full and true name, other than as herein stated, is to the grand jurors unknown, to go from one place to another in foreign commerce, that is to say, to go from the city of San Francisco, State of California, to the town of Tia Juana, in the Republic of Mexico, via the Southern Pacific Company Railroad, a common carrier, from the city of San Francisco to the city of San Diego, California, and via automobile stage, a common carrier, from the city of San Diego, California, to the town of Tia Juana, Mexico, for a certain immoral purpose, to wit, for the purpose of placing said Vida White alias Vida Rogers in a house of prostitution and having her remain therein, in said town of Tia Juana, Mexico.

Contrary to the form of the Statutes of the United [11] States in such case made and provided, and against the peace and dignity of the said United States.

#### SECOND COUNT.

And the grand jurors aforesaid, on their oath aforesaid, do further present:

That James B. Miller, whose full and true name, other than as herein stated, is to the grand jurors unknown, heretofore, to wit, on or about the 26th day of November, in the year of our Lord one thousand nine hundred and fifteen, within the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly, unlawfully and wilfully persuade, induce and entice a certain woman, to wit, one Vida White, alias Vida Rogers, whose full and true name, other than as herein stated, is to the grand jurors unknown, to go from one place to another in foreign commerce, that is to say, to go from the city of San Francisco, State of California, to the town of Tia Juana, in the Republic of Mexico, via the Southern Pacific Company Railroad, a common carrier, from the said city of San Francisco to the city of San Diego, California, and via automobile stage, a common carrier, from the city of San Diego, California,

to the town of Tia Juana, Mexico, for a certain immoral purpose, to wit, for the purpose of having said Vida White alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse.

Contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

ALBERT SCHOONOVER,

United States Attorney.
ROBERT O'CONNOR,
Assistant U. S. Attorney. [12]

[Endorsed]: Bond \$2,500. No. 1098—Cr. United States District Court, Southern District of California. The United States of America, vs. James B. Miller. True name, Jas. B. Simpson. Indictment for Viol. Act. June 25, 1910. Transporting female in foreign commerce for immoral purpose. A True Bill. S. J. Brown, Foreman. Presented and filed in open court, this 25th day of April, A. D. 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. Albert Schoonover, United States Attorney. [13]

At a stated term, to wit, the January term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the eighth day of May, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 1098—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

VS.

JAMES B. MILLER,

Defendant.

## Arraignment and Plea of Defendant.

This cause coming on this day for the arraignment of defendant and for the entry of his plea; Robert O'Connor, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendant being present on bail, with his counsel, James E. Wadham, Esq., and defendant having been called and arraigned, having stated that his true name is James B. Simpson, having waived the reading of the indictment, and, on being required to plead to said indictment, defendant having pleaded not guilty as charged therein, which plea is now by order of the Court entered herein; it is thereupon ordered that this cause be, and the same hereby is continued

for the setting of the same down for trial before the Court and a jury to be impaneled until the call of the General Trial Calendar for the July term, A. D. 1916, of this court. [14]

At a stated term, to wit, the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the eighteenth day of September, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ED-WARD E. CUSHMAN, District Judge.

No. 1098—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

Order Substituting Attorneys, Withdrawing Plea of Not Guilty and Allowing Demurrer to Indictment.

Robert O'Connor, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendant being present on bail; now, on motion of Alfred F. McDonald, Esq., it is ordered that said Alfred F. McDonald, Esq., be and he hereby is substituted in the place and stead of James E. Wadham, Esq., as

counsel for defendant; whereupon, on motion of Alfred F. McDonald, Esq., of counsel for defendant, and with the consent of Robert O'Connor, Esq., Assistant U. S. Attorney, of counsel for the United States, it is ordered that defendant's plea of not guilty be, and same hereby is withdrawn, with leave to defendant to serve and file a demurrer to the indictment herein within five (5) days, this cause, however, to remain set down for trial before the Court and a jury to be impaneled upon the day heretofore fixed for the same by order of the Court, to wit, on November 21st, 1916, at 10 o'clock A. M. [15]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES B. MILLER,

Defendant.

#### Demurrer to Indictment.

Comes now the defendant, James B. Miller, and demurs to the indictment herein on the following grounds:

I.

That said indictment does not, nor does any count or paragraph thereof, state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or statutes of the United States of America.

#### II.

That the first count in said indictment contained does not state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or statutes of the United States of America.

#### III.

That the second count in said indictment contained does not state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or statutes of the United States of America.

#### IV.

That said indictment and each of the counts therein contained does not substantially conform to, or comply with, the requirements of section 950 of the Penal Code of the State [16] of California, the State of which this court is holden.

#### V.

That said indictment and each of the counts therein contained does not substantially conform to, or comply with the requirements of section 951 of said Penal Code.

### VI.

That said indictment and each of the counts therein contained does not substantially conform to, or comply with the requirements of section 952 of said Penal Code.

#### VII.

That said indictment and each of the counts therein contained is not direct or certain as respects the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.

That said indictment and each of the counts therein contained is not direct or certain sufficiently to inform the defendant of the particular circumstance of the offense with which he is attempted to be charged.

That said uncertainty consists in the following matters:

That it is not alleged in said indictment or in either the first count or the second count therein contained, that the said defendant did knowingly, unlawfully, wilfully, persuade, induce and entice a certain woman to go from one place to another in foreign commerce for any immoral purpose which involves, constitutes, or creates any sexual immorality within the purview of the statutes mentioned in said indictment or for the purpose of prostitution, debauchery or other immoral purpose of the same sort or kind.

That it is not alleged in said indictment or in either the first count or the second count therein contained, that the [17] said defendant did knowingly, unlawfully and wilfully persuade, induce and entice a certain woman to go from one place to another in foreign commerce, with the intent and purpose on the part of the defendant that such woman should, or would engage in the practice of prostitution or debauchery or any other immoral practice of the same sort or kind.

That it is not alleged in said indictment or in either the first count or the second count therein

contained, that the woman mentioned therein was persuaded, induced or enticed to go from one place to another in foreign commerce for any purpose, either immoral or otherwise, or that said woman did commit any immoral act within the purview of the statute.

That it is not alleged in said indictment or in either the first count or the second count therein contained, that any of the alleged immoral acts or purposes attempted to be set forth therein as purposes for which the said woman was enticed, persuaded and induced to go from one place to another in foreign commerce, were, by the defendant intended, or would, under any circumstances, conduce, contribute or lead to, or be, sexual immorality, prostitution, debauchery or other acts or practices of the same kind, or that the acts of the defendant were by him calculated, or would have led or caused said woman to commit immoral acts, or engage in immoral practices of the same sort or kind.

That said indictment and each of the counts therein contained, is further uncertain and insufficient in that it can not be ascertained therefrom, how, or in what manner, or by what means, or by reason of what facts, the acts of the defendant set forth and alleged as his purposes in causing said woman to go from one place to another in foreign commerce, were, by said defendant calculated to, or would have constituted an immoral practice within the purview and meaning of the statute. [18]

Also, in that it can not be ascertained from said indictment, whether the purpose of the defendant

was to place said woman in said house of prostitution for the purpose of practicing prostitution or debauchery, or for the purpose of inducing or influencing her to give herself up to sexual immorality, by placing her in an environment where such existed, and if the latter, it is not alleged in said indictment, or either in the first or second count thereof, that said conditions or environment existed, or that said woman would thereby be placed among influences that would would have, eventually and naturally lead up to a course of immorality, sexually.

#### VIII.

That said indictment, and the first and the second count therein contained, is uncertain and insufficient, in that the specific acts of the defendant therein set forth are not alleged to have, by him intended to, or would have conduced to, caused or lead up to any of the immoral practices on the part of said woman, prohibited by the statute.

And further, in that it is not alleged or charged that the said woman was induced and persuaded to go from one place to another in foreign commerce for any purpose on her part, either moral, immoral or otherwise, nor either is it charged that the defendant so persuaded, induced and enticed said woman, with the intent on his part that she would practice prostitution, debauchery, or any other immoral practice of the same sort or nature, nor that the acts of the defendant would have, or could have, or were by him intended to have lead up to, contributed to, or caused said woman to engage in any im-

moral practice of the kind and nature set forth in the statute.

#### IX.

That the first count in said indictment contained is [19] uncertain and insufficient in that the alleged acts constituting the alleged purpose of the defendant in persuading, inducing and enticing said woman to go from one place to another in foreign commerce, do not specify that it was by said defendant intended, that said woman would engage in the practice of prostitution or debauchery, or any other practice of the same sort and nature, or any practice, either immoral or otherwise, and it is not alleged that the mere placing of said woman in a house of prostitution and having her remain therein, did lead, or contribute to, or cause said woman to engage in any immoral practice, nor that the environment or conditions under which said woman was placed in said house of prostitution were such that she would have, or was likely to have, eventually and naturally, been lead into a course of immorality sexually.

### $\mathbf{X}$ .

That the second count in said indictment contained is uncertain and insufficient in that the alleged acts constituting the alleged purpose of the defendant in persuading, inducing and enticing said woman to go from one place to another in foreign commerce, do not specify that it was by said defendant intended, or that said woman would have engaged in the practice of prostitution, or debauchery, or any other immoral practice of the

same sort or nature, and it is not alleged that the management of a house of prostitution by said woman was by said defendant intended to have, or would have lead, contributed to or caused said woman to engage in any immoral practice contemplated by the statute, or that the environment or conditions under which said woman was by said defendant intended to manage and conduct said house of prostitution such, that she would have, or was likely to, or that said conditions tended to, eventually and naturally lead her into a course of immorality contemplated by the statute.

WHEREFORE, the defendant, James B. Miller, prays that this demurrer be sustained and that said indictment be dismissed.

## ALFRED F. MacDONALD, Attorney for Defendant. [20]

I, Alfred F. MacDonald, attorney for the defendant, James B. Miller, do hereby certify that the foregoing demurrer to Indictment No. 1098, pending in the District Court of the United States, Southern District of the State of California, Southern District, is interposed in good faith and not for the purposes of delay, or for any other purpose, except to present to the Court the matters of law therein contained, and which I honestly believe to be well taken and valid, legal objections to defects appearing on the face of said Indictment.

## ALFRED F. MacDONALD, Attorney for the Defendant.

[Endorsed]: Original. No. 1098. In the District Court of the United States, Southern Division

of California, Southern Division. United States of America, Plaintiff, vs. James B. Miller, Defendant. Demurrer to Indictment. Received Copy of the within Demurrer to Indictment this 22d day of September, 1916. Albert Schoonover, United States District Attorney. By Robert O'Connor, C. A. T. Filed Sep. 23, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Alfred F. MacDonald, 600 Bryson Block, Los Angeles, California, 10985, Phones M. 985, Attorney for the Defendant. [21]

At a stated term, to wit, the July Term, A.D., 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the twenty-fifth day of September, in the year of our Lord one thousand nine hundred and sixteen. Present. The Honorable OSCAR A. TRIPPET, District Judge.

No. 1098—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MIL-LER,

Defendant.

### Order Overruling Demurrer.

This cause coming on this day to heard on defendant's demurrer to the indictment; Robert O'Connor, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; Alfred F. MacDonald, Esq., appearing as counsel for defendant; and said demurrer having been argued, in support thereof, by Alfred F. MacDonald, Esq., of counsel for defendant, it is thereupon by the court ordered that defendant's demurrer to the indictment be, and the same hereby is overruled, to which ruling of the Court, on motion of said counsel for defendant and by direction of the Court, exceptions are hereby noted herein on behalf of said defendant. [22]

At a stated term, to wit, the July term, A.D., 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Tuesday, the twenty-first day of November, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. Trippet, District Judge.

No. 1098—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MIL-LER,

Defendant.

### Minutes of the Trial-November 21, 1916.

This cause coming on this day to be tried before the Court and a jury to be impanelled; Clyde R. Moody, Esq., and Robert O'Connor, Esq., Assistant U. S. District Attorneys, appearing as counsel for the United States; defendant being present on bail, with his counsel, Alfred F. MacDonald, Esq.; W. C. Wren being present as shorthand reporter of the testimony and proceedings, and acting as such; and both sides having answered ready; now, on motion of Alfred F. MacDonald, Esq., of counsel for defendant, it is ordered that Jud R. Rush, Esq., who is present in Court, be, and he hereby is associated with said Alfred F. MacDonald, Esq., as counseel for defendant; and it is further ordered, pursuant to the stipulation in open court of counsel for the respective parties, that exceptions to all rulings of the Court during the trial shall be deemed to have been asked for and noted on behalf of the party against whom each particular ruling shall have been made; and the Court having ordered that the trial proceed, and that a jury be impanelled herein; and the following twelve (12) petit jurors having been duly drawn, called and sworn on voir dire, to wit: Wm. Chislett, A. G. Munn, Willis P. Smith, Jos. [23] A. Anker, Wm. L. Barrowman, M. L. Rossiter, L. T. Bradford, Philo L. Lindley, W. B. Brown, A. R. Townsend, C. A. Henderson and Geo. B. Wilson; and said jurors having been examined by the Court and by counsel for the Government and by counsel for defendant and passed for cause; and Wm. L. Barrowman having been challenged peremptorily by the Government and excused; and L. C. Turner, a petit juror, having been duly drawn, called, sworn on voir dire, examined by the Court and by counsel for the Government and by counsel for defendant and passed for cause; and the twelve jurors now in the box having been accepted by counsel for the Government and by counsel for defendant and duly sworn as the jury to try this cause, said jury as so impanelled and sworn consisting of the following named jurors, to wit:

#### JURY:

- 1. Wm. Chislett, 7. L. T. Bradford,
- 2. A. G. Munn, 8. Philo L. Lindley,
- 3. Willis P. Smith, 9. W. B. Brown,
- 4. Jos. A. Anker, 10. A. R. Townsend,
- 5. L. C. Turner, 11. C. A. Henderson,
- 6. M. L. Rossiter, 12. Geo. B. Wilson.

And the indictment having been read to the jury and defendant's plea of not guilty having been announced to the jury by the clerk; now, on motion of Alfred F. MacDonald, Esq., of counsel for the defendant, and with the consent of Government's counsel, it is ordered that all of the witnesses herein, except Dave Gershon, a Government witness, be excluded from the courtroom during this trial, except when actually upon the witness stand for the purpose of testifying; and Clyde R. Moody, Esq., Assistant U. S. Attorney, of counsel for the United States, having made a statment to the jury of what the Government expects to prove; and Louise Bordeau, Dave Gershon and Ernest Estudillo having respec-

tively been called and sworn as witnesses on behalf of the [24] United States and having given their testimony; and the Court having admonished the jury that, during the progress of this trial, they are not to permit other persons to speak to them, nor themselves speak to other persons about this case or anything connected with this case, and that, until said case is finally given them under the instructions of the Court, for consideration, they are not to speak to each other about this case, or anything connected therewith; and Court, at the hour of 11:20 o'clock A. M., having taken a recess for 11 minutes; and now, at the hour of 11:31 o'clock, A. M., court having reconvened; and counsel, defendant and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present, in court; and Charles H. Cousing, H. M. Stanley and Julian E. Cliff having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and the court having given the jury the usual admonition; and having excused said jurors until the hour of 2 o'clock P. M., of this day; and Court, at the hour of 11:52 o'clock A. M., having taken a recess until the hour of 2 o'clock P. M., of this day;

And now, at the hour of 2 o'clock P. M., Court having reconvened; and defendant, counsel and short-hand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and Arthur Wm. Mosedale and F.

A. Bennett having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and in connection with the testimony of the last named witness, the Government having offered an exhibit, which is admitted in evidence in its behalf, to wit, Pl. Ex. 1. Card for telegraph charge account; and, also in connection with the testimony of said last-named witness, the Government having offered for identification certain exhibits, which are for identification marked with certain exhibit designations, to wit, Plf. Ex. 2, office copy of a telegram received by telephone; Pl. Ex. 3, carbon copy bill to J. B. Miller; and Pl. Ex. 4, "Cash rec'd" sheet; and the Court having given the jury the usual admonition, and having, at the hour of 2:37 o'clock P. M., excused the jurors from the courtroom temporarily; and a question of the admissibility of certain evidence having been argued by counsel for the respective parties; and the jury, at the hour of 2:58 o'clock P. M., having been recalled into court; and counsel for respective parties having stipulated that the jury are present, and all of said jurors being present in court: and the Court having given the jury the usual admonition; it is, at the hour of 3 o'clock P. M., ordered that this cause be, and the same hereby is continued until Wednesday, the 22d day of November, 1916, at 10 o'clock A. M., for further trial, until which time the jurors are excused. [26]

At a stated term, to wit, the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Wednesday, the twenty-second day of November, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 1098—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

# Minutes of the Trial-November 22, 1916.

This cause coming on this day to be further tried before the Court and a jury heretofore impaneled herein; Clyde R. Moody, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; Alfred F. MacDonald, Esq., and Jud R. Rush, Esq., appearing as counsel for defendant; who is present in court on bail; W. C. Wren being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Myrl Stoezel having been called and sworn as a witness on behalf of the United States, and having given

testimony; and in connection with the testimony of said witness, the Government having offered for identification an exhibit, which is for identification marked with certain exhibit designations, to wit, Pl. Ex. 5, Western Union telegram to Mrs. Vida White; and Etta Naylor having been called and sworn as a witness on behalf of the United States, and, in connection with the testimony of said witness, the United States having offered two exhibits, heretofore offered and marked for identification, which are admitted in evidence in its behalf, to wit, Pl. Ex. 3 and Pl. Ex. 4; and Louise Bordeau and F. A. [27] Bennett, witnesses on behalf of the United States, having respectively been recalled for further examination, and having given their testimony; and, in connection with the testimony of said last-named witness, the Government having offered for identification an exhibit, which is for identification marked with certain exhibit designations, to wit, Pl. Ex. 6, Western Union message, received Nov. 26, 1914; and the jury having been given the usual admonition by the Court; and Court thereupon, at the hour of 10:42 o'clock A. M., having taken a recess for 33 minutes; and now, at the hour of 11:15 o'clock A. M., court having reconvened; and defendant, counsel and shorthand reporter being present as such; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and F. A. Bennett, a witness on behalf of the United States, having again taken the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, the Government having offered for identification an exhibit, which is for identification marked with certain exhibit designations, to wit, Pl. Ex. 7, delivery sheet of telegram; and the Government having also offered two exhibits heretofore marked for identification, to wit, Pl. Ex. 2 and Pl. Ex. 5, which offer is refused and said exhibits not admitted in evidence; and the Government having rested; and Jud R. Rush, Esq., of counsel for defendant, having, on behalf of said defendant, moved the Court to instruct the jury to return a verdict of not guilty in this cause; it is by the Court ordered that defendant's said motion for an instructed and directed verdict of not guilty herein be, and the same hereby is denied; and defendant having rested; and the testimony being closed; and this cause having been argued to the jury, on behalf of the Government, by Clyde R. Moody, Esq., Assistant U. S. Attorney, of counsel for the United States, and on behalf of defendant by Jud R. Rush, Esq., [28] of counsel for defendant, and on behalf of the Government in reply by Clyde R. Moody, Esq., Assistant U. S. Attorney, of counsel for the United States; and the argument being concluded; and the Court having given the jury the usual admonition; and Court thereupon, at the hour of 11:50 o'clock A. M., having taken a recess until the hour of 2 o'clock P. M. of this day, until which hour the jurors are excused;

And now, at the hour of 2 o'clock P. M., Court having reconvened; and defendant, counsel and shorthand reporter being present as before; and the

roll of the jury having been called, and all being present; and the Court having read its written instructions to the jury; it is, on motion of defendant's counsel ordered that exceptions be,, and hereby are noted herein on behalf of said defendant to the refusal of the Court to give such of the instructions requested by defendant as the Court did refuse to give, and also to each and every of the instructions given by the Court; and Josiah W. Bell, a Deputy U. S. Marshal, having been duly sworn to take charge of the jury; and the jury, at the hour of 2:20 o'clock P. M., having retired in charge of said sworn officer; and, at the hour of 2:30 o'clock P. M., the Honorable Oscar A. Trippet, District Judge, having left the bench to await the incoming of the jury; and now, at the hour of 4:42 o'clock P. M., court having reconvened; and the jury having come into court; Clyde R. Moody, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendant being present on bail, with his counsel, Alfred F. MacDonald, Esq.; and the shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and the jurors having been asked if they have agreed upon a verdict, and having by their foreman replied that they have not so agreed; and the jury having asked for additional instructions; and the Court [29] having given the jury additional instructions; and the indictment in this cause having been again read to the jury; and the jury at the hour of 5:02 o'clock P. M., having again retired in charge of said sworn officer; and thereupon the Honorable Oscar A. Trippet, District Judge, having left the bench to await the incoming of the jury; and now, the jury having come into court, at the hour of 5:02 o'clock P. M.; Clyde R. Moody, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendant being present on bail, with his counsel, Alfred F. MacDonald, Esq.; and the shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and the jurors having been asked if they have agreed upon a verdict, and having by their foreman replied that they have so agreed, and having been required to present their verdict, and their verdict having been read by the clerk; now, by direction of the Court, said verdict is filed and recorded by the clerk, said verdict as so recorded being as follows, to wit:

"In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 1098—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

We, the jury in the above-entitled cause find the defendant James B. Simpson, indicted as James B. Miller, not guilty as charged in the first count of the indictment, and guilty as charged in the second count of the indictment, with recommendation for leniency.

Los Angeles, California, November 22, 1916.

L. T. BRADFORD,

Foreman."

And said verdict having been read to the jury as so recorded, and the jurors having said that it is their verdict; it is now by the [30] Court ordered that said jurors be, and they hereby are excused from further attendance upon the Court until Tuesday, the 28th day of November, 1916, at 10 o'clock A. M.; and it is further ordered, on motion of counsel for defendant, that this cause be, and the same hereby is continued for the sentence of defendant until Monday, the 27th day of November, 1916, at 10 o'clock A. M.,, and that in the meantime defendant remain at large upon his present bail bond. [31]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1098—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

#### Verdict.

We, the jury in the above-entitled cause find the defendant James B. Simpson, indicted as James B. Miller, Not Guilty as charged in the first count of the Indictment, and Guilty as charged in the second count of the Indictment, with recommendation for leniency.

Los Angeles, California, November 22, 1916. L. T. BRADFORD, Foreman.

[Endorsed]: No. 1098. U. S. District Court, Southern District of California, Southern Division. United States vs. James B. Simpson, Indicted as Jas. B. Simpson. Verdict. Filed Nov. 22, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [32]

At a stated term, to wit, the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the fourth day of December, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

# No. 1098—CRIM. S. D. THE UNITED STATES OF AMERICA, Plaintiffs,

vs.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

# Minutes of the Trial—December 4, 1916.

This cause coming on at this time to be heard on defendant's motion for a new trial, and also coming on for the sentence of defendant; Clyde R. Moody, Esq., Assistant U.S. Attorney, appearing as counsel for the United States; defendant being present on bail, with his counsel, Jud R. Rush, Esq., and Alfred F. MacDonald, Esq., and said motion for a new trial having been argued, in support thereof, by Alfred F. MacDonald, Esq., and Jud R. Rush, Esq., of counsel for defendant, and in opposition thereto by Clyde R. Moody, Esq., Assistant U. S. Attorney, of counsel for the United States; it is by the Court ordered that said motion for a new trial be, and the same hereby is denied, to which ruling of the Court, on motion of defendant and by direction of Court, exceptions are hereby noted herein on behalf of said defendant; and it is further ordered, on motion of defendant, by his said counsel that exceptions be, and hereby are noted herein on behalf of said defendant to the last instruction given the jury by the Court on the trial of this cause, to wit, the instruction given the jury at their request after the cause had been submitted to said jury; and a motion of defendant in arrest of judgment having been [33] filed herein and presented to the Court, it is ordered that said motion in arrest of judgment be, and the same hereby is denied; and statements in mitigation of sentence having been made by Alfred F. MacDonald, Esq., of counsel for defendant; it is ordered that this cause be, and the same hereby is continued for the sentence of defendant until Monday, the 11th day of December, 1916, at 2 o'clock P. M. [34]

At a stated term, to wit, the July term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Tuesday, the twelfth day of December, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 1098—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

Minutes of the Trial—December 12, 1916.

This cause coming on at this time for the sentence of defendant; Clyde R. Moody, Esq., Assistant U. S.

Attorney, appearing as counsel for the United States: defendant being present on bail, with his counsel, Alfred F. MacDonald, Esq., the Court thereupon pronounces sentence upon said defendant for the offense of which he now stands convicted, namely, the offense of transporting female in foreign commerce for immoral purpose, as follows, to wit: The judgment of the Court is, that the defendant, James B. Simpson, indicted as James B. Miller, be imprisoned in the United States Penitentiary at Mc-Neil Island, State of Washington, for the term of one (1) year and one (1) day, and that he pay a fine of one thousand (1,000) dollars, to which sentence, on motion of defendant and by direction of the Court, exceptions are hereby noted herein on behalf of said defendant. Defendant is remanded to the custody of the U.S. Marshal. [35]

In the District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

# Bill of Exceptions of Defendant.

Be it remembered that heretofore, to wit, on the 25th day of April, 1916, the grand jury of the United States in and for the Southern District of California, Southern Division, did find and return into the

above-entitled court its indictment against the defendant, James B. Simpson, sometimes otherwise known as James B. Miller, for violation of Section 3 of the "Mann White Slave Traffic Act," and thereafter on the 8th day of May, 1916, the said James B. Miller appeared in said court and was duly arraigned upon the said indictment, and entered his plea of "not guilty" thereto, and thereafter, upon the 18th day of September, 1916, upon motion of counsel for said defendant, and with the consent of counsel for plaintiff, and upon order of the aboveentitled court duly made and entered, the said plea of "not guilty" was withdrawn, and leave granted to the defendant to file a demurrer to said indictment, and thereafter, upon the 23d day of September, 1916, said defendant filed in said court his demurrer to said indictment, and thereafter, on the 25th day of September, 1916, said demurrer was duly heard by the said Court; which duly and regularly made its order overruling said demurrer; to which order of the Court then and there made, overruling the demurrer of said defendant, the said defendant took [36] an exception, which exception was then and there duly and regularly allowed and entered by the Court.

That thereafter, upon the 21st day of November, 1916, said cause came on duly and regularly for trial, the Government being represented by Clyde R. Moody, Esq., Assistant United States District Attorney for the Southern District of California, and the defendant being represented by Alfred F. Mac-

Donald, Esq., and Jud R. Rush, Esq., of the firm of Davis & Rush.

Thereupon a jury to try the cause was duly and regularly impaneled, and the following proceedings took place on and during the trial, to wit:

# Opening Statement on Behalf of the Prosecution.

By Mr. MOODY.—If the Court please, and gentlemen of the jury: In this case the United States expects to prove that the defendant who now gives his name as James B. Simpson, but who was indicted as James B. Miller, owned or leased certain property in the city of Tia Juana, and that he built on that property, or caused to be built, a house comprising some eighteen or twenty rooms, and which he intended to use and did use as a house of prostitution; that he was acquainted with a woman at the time he built this house in Tia Juana, by the name of Vida Rogers, or Vida White; that Vida White at that time was residing in San Francisco. about the time that he finished his house in Tia Juana he sent a telegram to Vida White, asking that she come down to Tia Juana and take charge of the house that he had built there, and that he would split fifty-fifty with her; and that subsequently to that he wired her again, urging her to come immediately and take charge of the house; and that she did go from the city of San Francisco to the city of Tia Juana, in Mexico, and that she did there take charge of this house, which he had built, and which was used as a house of prostitution, and that she became the mistress or the landlady of this house of prostitution in Tia Juana, which was owned and

[37] run by this defendant, James B. Simpson. And under the evidence which we will introduce, and the instructions of the Court, we will then expect a verdict of guilty at your hands.

# Testimony of Louise Bordeau, for the Government.

LOUISE BORDEAU, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

#### Direct Examination.

My name is Louise Bordeau. I live at the James Apartments in this city. In the fall of 1915, I lived in San Francisco. Lived there about seven months. I knew a woman in San Francisco by the name of Vida Rogers; she also went by the name of Vida White. I met her in a house of prostitution at 43 Washington Alley. I was engaged in prostitution at this house at Washington Alley. She was the housekeeper at the place. This was about July, 1915. The day after Thanksgiving, in November, 1915, she left 43 Washington Alley and I left with her. At the time she was housekeeper at 43 Washington Alley, she also had a residence at the Berkeley Hotel. Vida Rogers received two telegrams about the time she and I left San Francisco.

Q. I will exhibit to you a telegram, which I will call United States Exhibit 1 for identification, and I will ask you if that is the wording of the telegram that you say that this woman received?

Mr. RUSH.—Just a moment. I object to that question as incompetent, irrelevant and immaterial.

The COURT.—I think the "wording," Mr. Moody—if that is the telegram—

Mr. MOODY.—Your Honor, it is impossible to produce the typewritten telegram which is delivered to a woman, but the telegram which is filed, and which can subsequently be proven to have been filed,—if this woman can testify that that is the same wording that she saw at that time, then it would be a sufficient connection of the telegram. [38]

The COURT.—If you want to introduce a copy, you will have to show that you cannot produce the original.

Mr. MOODY.—This is the original; this is not a copy. This is the one which was filed for record, and which was sent, which was filed in San Diego. This is not a copy.

Mr. RUSH.—I want to add to my objection the further ground that it calls for hearsay.

The COURT.—Now, do you propose to prove that you cannot get the copy, or the original, whichever it may be designated?

Mr. MOODY.—I propose to show that the woman, Vida Rogers, is without the jurisdiction of this court.

The COURT.—And that she has got that telegram?

Mr. MOODY.—That is impossible for us to say. The last time we had any information about it, she had it. But she is now without the jurisdiction of the court, and the process of this Court will not reach her.

The COURT.—You are going to prove that?

Mr. MOODY.—I will prove that by this witness.

The COURT.—I think you better prove that first, Mr. Moody.

Mr. MOODY.—Q. Do you know where Vida Rogers is at the present time?

- A. I believe she in Tia Juana.
- Q. When did you see her in Tia Juana last?
- A. It was about in July, was the last time I was over there.
  - Q. And she was there at that time?
  - A. She was there at that time.
  - Q. Have you seen her since?

Mr. RUSH.—When was that?

Mr. MOODY.—In July of this year.

The COURT.—Q. July of this year you are speaking about? A. Yes. [39]

Mr. MOODY.—Q. Have you seen her since?

- A. No, I have not.
- Q. Have you seen her in the United States since last November? A. Oh, yes, sir.
- Q. When was the last time you saw her in the United States?
- A. Well, it was some time right after the floods; I don't remember just when.
  - Q. The last January floods? A. Yes.
- Q. And since that time you have not seen her in the United States? A. No.

Mr. MOODY.—Now, if the Court desires at this time any further evidence on the whereabouts of the woman, Vida Rogers, I can produce such testimony

(Testimony of Louise Bordeau.) and withdraw this witness.

The COURT.—Well, I will not require you to withdraw her. Upon your representation that you expect to do it, I will permit the evidence, and I will strike it out if you fail to produce the evidence.

Mr. RUSH.—Your Honor, before your Honor rules will you permit me to just suggest one matter, and that is this: I do it because I don't think your Honor apprehends the point of my objection. Before it can be shown that a telegram was received in San Francisco by this woman, or by anyone, it must be shown a telegram was sent, and before it can be proven that the telegram was sent, it must be proven it was sent by this defendant. So to show this woman a writing, or what purports to be a copy —not the thing that she saw there, but something containing the same language that she saw thereand ask her to refresh her memory from that, and say that that is the same language that was in the telegram that she saw in San Francisco, in any event [40] would not be competent. She can only refresh her recollection from memoranda that she made herself. She cannot refresh her recollection from memoranda made by some one else, and which she, herself, did not see made, and never saw before this time. This, at the most, would be simply a memorandum of what the operator in the town from which it was sent, sent, and is not the identical object that she saw.

The COURT.—Isn't that so, Mr. Mooody, that she can only refresh her memory and testify—she has

(Testimony of Louise Bordeau.) either got to testify from memory, or from memoranda which she made herself?

Mr. MOODY.—The reason why I didn't ask her was because I did not desire that this woman should testify what was in the telegram that she saw in San Francisco—which she can testify from memory after it is shown that the telegram, or the party in whose custody it was, is now without the jurisdiction of the court—until after this telegram had been introduced in evidence; and I was only attempting at this time to present this telegram in the record for the purpose of identification by this witness. If the Court desires, I can ask her what was in that telegram.

The COURT.—I think you better proceed that way, from her own memory.

Mr. MOODY.—Q. You say this woman received a telegram in San Francisco just prior to the time that you and she left there; is that right?

- A. Yes, sir.
- Q. Do you remember about what date it was that she received the telegram?
  - A. No, sir, I couldn't tell you that, the day.
- Q. Well, about how long was it before the day after Thanksgiving, the day upon which you said you left?
  - A. It must have been—oh, close onto three weeks.
- Q. About three weeks before you left that she received this telegram? [41] A. Yes, sir.
- Q. Do you recall at this time—do you recall whether or not Vida Rogers showed you the telegram and whether you read the telegram that she received,

the first one? A. Yes, sir.

- Q. And do you recall at this time the substance of that telegram?
  - A. Well, perhaps not word for word.
  - Q. But do you recall the substance of it?
  - A. Yes, sir.
  - Q. What was the substance of it?

Mr. RUSH.—We object to that as incompetent, irrelevant and immaterial, and no proper foundation laid, and hearsay.

The COURT.—Well, on the promise of the United States Attorney that they will show that the recipient of the telegram is not in the jurisdiction of the Court, the objection will be overruled.

By the COURT.—Q. Now, did this woman keep the telegram after you saw it? Was it in her possession the last time you saw it?

- A. Yes, your Honor.
- Q. Well, answer the question.

Mr. RUSH.—We except to the ruling of the Court. I understand—the Court will pardon me if I inquire, in this court do we have to enter an exception to the ruling if we desire it, or does the rule that applies in the State court apply here now?

The COURT.—I do not think the rules apply, of the State court.

Mr. RUSH.—So that any time that we desire an exception to a ruling, we must enter our exception? [42]

The COURT.—You can have a stipulation on that subject, if you desire it, to have an exception entered.

Mr. RUSH.—Will you stipulate that any time we object, we need not enter an exception, but that the exception may be presumed to have been preserved and entered, without going through the necessity in each instance?

Mr. MOODY.—I will so stipulate—in order to expedite the case—I will stipulate an exception may be deemed taken to all rulings.

Q. Now, will you kindly state the wording of the contents of the telegram as you remember it?

A. It was about a house with a dance-hall, kitchen and bar and five rooms in connection. Looks like a good proposition. Will finance everything. Will split fifty-fity.

Q. Who signed the telegram, if you know; or whose name was signed to the telegram, if you know?

A. Just "Jim."

Q. Do you know anyone who is called Jim?

A. Mr. Miller, Jim Miller.

Mr. RUSH.—We object to that as incompetent, irrelevant and immaterial. Doubtless a great may men are called Jim.

The COURT.—I think that is too general, Mr. Moody. The answer will be stricken out.

I know the defendant in this case. I see him in the courtroom. I first met him in San Francisco last summer, when I was working at 43 Washington Alley. Vida Rogers introduced me to him. I could not recall the number of times I saw him at Washington Alley. It was not a large number, perhaps three or four times in all the time that I was working

there. Vida Rogers just introduced him to me as "Jim." She never made any statements to me in his presence as to who he was. I never [43] knew him under any other name than Jim. I knew him as Jim Miller. She just introduced me as Jim, but she spoke about him as Jim Miller. The next place I saw the defendant was in Tia Juana.

- Q. Before you went to Tia Juana, did Vida Rogers receive any other telegram, if you know?
  - A. She received one other.
  - Q. About how long after the first one came.
- A. It must have been two weeks after the first one came.
  - Q. And how long before she left San Francisco?
  - A. Just a very few days.
  - Q. Did you see that telegram? A. Yes, sir.
  - Q. Did you read it? A. Yes, sir.
- Q. Do you recall at this time what that telegram said? A. Yes, sir.
  - Q. What did it say?

Mr. RUSH.—We object to that on the ground it is incompetent, irrelevant and immaterial, no proper foundation laid, not the best evidence, and calls for the the state of the s

The COURT.—Q. Was this the last time you saw it, in the possession of this woman, Vida Rogers?

A. Yes, sir.

The COURT.—And you expect to show that you cannot produce the telegram, in the manner you have heretofore stated concerning the other telegram?

Mr. MOODY.—In the same manner, your Honor.

The COURT.—The objection will be overruled.

Mr. MOODY.—Q. What did that telegram say, as near as you can recall at this time?

A. That everything ready. Leave Thursday or Friday, I [44] believe it was.

Q. Do you remember by whom it was signed? A. "Jim."

I don't think I remember this telegram as well as I do the other one; I did not see it as well. She showed me the telegram, though, but the first one, I saw it three or four different times. Vida Rogers had the second telegram after I saw it. I didn't see it more than once, that being the time I looked at it.

I left San Francisco in company with Vida Rogers the first day after Thanksgiving, 1915, and went to Tia Juana. I went in company with Vida Rogers, by train to San Diego, and I went by myself from San Diego to Tia Juana. I laid over in San Diego a day. When I reached Tia Juana, I went to the Palace, which is a dance-hall and house of prostitution. I saw Vida Rogers in the Palace, also Miller, the defendant. I remained there from November up until after the flood. Vida Rogers was running the place, she was the landlady. When the house was first new, when I first went over there, I used to see Jim Miller, the defendant, there quite often. He stayed there three or four instances that I recall. When he was there, he ate at the restaurant for the girls connected with the Palace. He ate there quite often. I don't recall any particular statements that he made around the house. I don't know positively

who owned the Palace. I heard Miller make statements that he owned it.

By the COURT.—Q. How many girls were in that house?

- A. At one time there were 22 girls in the house.
- Q. How many rooms for girls to entertain company?
- A. I believe there were four rooms in the house, and then an extra house that had 22 rooms in it.
  - Q. How far was this extra house away?
  - A. Right next door to the place.
- Q. Did Vida Rogers have anything to do with that? [45]
- A. It was connected with the Palace; it was just rooms.
  - Q. Were all those girls engaged in prostitution?
  - A. Yes, sir.

At one time there were twenty-two girls in the house. I believe there were four rooms in the house, and then an extra house that had twenty-two rooms in it. The extra house was right next door to the place. All the girls were engaged in prostitution and most of them were Americans. I traveled to Tia Juana from San Diego by stage.

#### Cross-examination.

Vida Rogers received the first telegram about three weeks before we left San Francisco. She came down to San Diego once before, right after she got this first telegram, and was gone a few days and then came back to San Francisco. She showed the telegram to all of the girls. I have talked with the

authorities in reference to the contents of a telegram received by Vida Rogers. I talked over with them what was in that telegram and they showed me the same telegram you have there. I told them before they got the telegram what was in it, and I was able to do this without refreshing my memory from this document that they showed me. Two or three days after Vida Rogers received the first telegram she went to San Diego. She stayed a couple of days and then came back. She received the other telegram just before we left. Vida Rogers was the landlady or housekeeper of this place in San Francisco. She is a woman between 35 and 40 years of age, in my opinion. I stayed in San Diego one night before I went to Tia Juana. I saw the house when I arrived in Tia Juana, and it had five rooms, kitchen and dance-hall. That was the only house that I saw there at that time. Later another house was built. I couldn't state how long after I went there, the other house was built. It was built in December. I don't remember what month it was finished. I engaged in prostitution in the house. I was required [46] to get a license to do that. Vida Rogers was required to get a license to run a house of that nature. I have seen her license; it was on the wall in the bar-rooom. The license was made to Vida Rogers. She also had a license to sell liquors and tobacco. I have seen them and they are in the name of Vida Rogers. The licenses were issued by the Mexican government. The Palace and Tia Juana are on the Mexican side of the line.

# Testimony of Dave Gershon, for the Government.

DAVE GERSHON, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

#### Direct Examination.

My name is Dave Gershon, and I reside in San Diego. With the Bureau of Investigation, Department of Justice. I have been in Tia Juana within the last few days. About ten days ago. I know Vida Rogers. I saw her in the last few days at the Palace, in Tia Juana, Mexico. I have been trying to serve her on this side of the line for some time last past, possibly since last February or March, and have not been able to do so. I have not seen her on this side of the line.

#### Cross-examination.

I was trying to serve a subpoena on her in this case. I did not take any steps to prevent her coming across the line to the United States. I did not furnish the newspapers with any report that I had a warrant issued by Commissioner Hammack for her arrest and staked men all along the line, and that the moment she put her foot across the line, she would be arrested. I do not know who did furnish that information. I have not got a subpoena with me now. I was not trying to serve a subpoena on her. I was going to get a subpoena when I located her on this side. If she came over on this side, I was going to come up here, or send up here and get a subpoena to serve on her. I never had any conversation with her in regard to this case. I never in-

(Testimony of Dave Gershon.)

timated to [47] her that I wanted her to appear as a witness in this court in this case. I do not know whether she would have done so or not. It has been possibly ten days or two weeks ago since I saw her. She was then in Tia Juana. I never had any subpoena to serve on her.

# Testimony of Ernest Estudillo, for the Government.

ERNEST ESTUDILLO, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

#### Direct Examination.

My name is Ernest Estudillo. I reside in San Diego. I resided in Tia Juana last November. came back to San Diego about a month ago. I knew the defendant about the 29th of December. T went to work for him at that time. I did not know him previous to that time. I know a place in Tia Juana called the Palace. I know the landlady there; her name is Vida. I have known her since I went to work in the house. I knew the place before I went to work there. I was a policeman in Tia Juana and know that the Palace was a house of prostitution. I went to work in the house on the 29th of December. A representative of Mr. Miller hired me to go down there and work as a policeman at the Palace. Mr. Miller gave an order to a fellow by the name of Tony to pay me. I received my money in pursuance of that order. I don't know who Tony was. I didn't know him until I went into that house there. Tony, I guess, was a bartender in the Palace; he was act(Testimony of Ernest Estudillo.)
ing like a manager there, as far as I know. I saw
Miller there a good many times.

#### Cross-examination.

I went to work at the Palace on the 29th day of December. The new building had been built. Before this the old building was a house of prostitution and contained a kitchen, dining-room, bar and five rooms. In Tia Juana, the one who runs a house of [48] prostitution must have a license. didn't pay any attention to who had the license to run that house. Tony, the bartender, or the man who appeared to be the manager in the house, paid me my wages, but Mr. Miller gave the orders to pay men. He told me they would pay me more wages than I was getting at the Casino. He saw me over to the parlor house. The subprefecto sent me from the Casino over there in the first place. He told the cop over there to change with me, on account I could talk English. Each house has a man who is named by the subprefecto, and who is paid by the house, and I, working over in the Casino, was sent by the subprefecto down to this house, the Palace.

- Q. The government has got nothing to do with the pay?
- A. The government has got orders to send a man that they can depend on, but they got nothing to do with the pay; the house pays.
- Q. Let's see if I am right. Each house has a man who is named by the subprefecto of the government, and who is paid by the house?
  - A. By the house, certainly.

(Testimony of Ernest Estudillo.)

- Q. And you, working over in the Casino, were sent by the subprefecto down to this house, to the Palace? A. Yes.
- Q. And you were paid when you were working in the Casino by the Casino, and paid when working in the Palace by Tony?

  A. I didn't catch that.
- Q. When you worked at the Casino, the Casino paid you? A. Why, certainly.
- Q. And when you worked in the Palace, Tony, who was the bartender and appeared to be the manager, paid you there? A. Yes.

# Testimony of Charles H. Cousins, for the Government.

CHARLES H. COUSINS, called as a witness on behalf of the prosecution, being first duly [49] sworn, testified as follows:

#### Direct Examination.

My name is Charles H. Cousins. I reside in San Diego. I am a carpenter and builder, and have been for 32 or 33 years. I know the defendant, Miller, and have known him about two years. I know where the Palace is in Tia Juana. I built it last year, a year ago, some time in the fall. Mr. Miller, this defendant, authorized me and hired me to build the Palace. He also paid me for building it. The place had eighteen or twenty rooms. There was a door to go from the old building into the other building. I do not know Vida Rogers or Vida White. I saw Louise Bordeau around the new place. I do not know who the proprietress of the place was. I built

(Testimony of Charles H. Cousins.)

both the new building and the old one. I built the old building for Mr. Savin, four or five months before I built the new building.

### Testimony of H. M. Stanley, for the Government.

H. M. STANLEY, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

#### Direct Examination.

My name is H. M. Stanley. I am a police officer in San Diego. Have been about ten years. I know the Palace, in Tia Juana, and have known it since it opened about a year ago. I know the defendant J. B. Miller. I have seen him in Tia Juana. Saw him at the Hot Springs and at the Palace. I had a conversation with him about the Palace. Officer Whistler and myself went over there to investigate a couple of girls in the place and we met Mr. Miller. I asked him in regard to these girls, and he said, "I will see my landlady and she may give you this information." I believe her name was White. We consulted his landlady, in his presence, and at that time I said to him, "You might run up against a snag, Miller, running this place." And he said, "Well, I am in the clear; I don't run it, but my landlady runs it for me." The place is a house of prostitution. [50]

#### Cross-examination.

I testified in this matter before the commissioner in San Diego on the 8th day of March, this year. At that time, I testified as follows: "He said, 'I don't (Testimony of H. M. Stanley.)

know whether this girl is in here or not; I will ask my landlady and she will be able to tell you. She does all the business for me.' I says, 'You want to watch out, Miller, or you will get in a jam with her running this place.' And he says, 'I am in the clear; I am not running it; my landlady is running it.'" I must have omitted "for me," because I am positive he said "for me." Mr. Miller was running the Hot Springs at that time. This conversation was held in January.

# Testimony of Julian Eugene Cliff, for the Government.

JULIAN EUGENE CLIFF, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

#### Direct Examination.

My name is Julian Eugene Cliff. I reside in San Diego. In November, 1915, I was manager of the Victoria Apartments in San Diego, at 1069 10th St. I know this defendant, Mr. Miller. In November of 1915, he had an apartment there. He moved in about September 28th. He was there about the 1st of December. His apartment was number 31. He had a phone in his apartments. The house has what is known as a hotel system, and it may be connected with the exchange if the tenant pays extra for it. Mr. Miller had the house system phone, it was connected up with the exchange. It is the tenant's privilege to have the exchange connected up with his instrument that is in his room, and if it is, he gets a special number. The special connection was

(Testimony of Julian Eugene Cliff.)

made at either Mr. or Mrs. Miller's request. The number of the Victoria Apartments, the office phone was Main 3857. The number of the phone in his apartment was Main 6626. The bills were sent to the Victoria Apartments and I paid it and it was added to their [51] bill. I believe Mr. Miller paid his telephone bill during the time he occupied the apartment.

#### Cross-examination.

The defendant occupied a single apartment. His wife lived with him there. I have seen her here to-day.

# Testimony of Arthur William Mosedale, for the Government.

ARTHUR WILLIAM MOSEDALE, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

My name is Arthur William Mosedale and I reside in San Diego. I am employed by the telephone company, and was so employed last October, 1915. On October 11, 1915, I installed a telephone in Apartment 31 of the Victoria Apartments. The number of the phone was Main 6626.

# Testimony of F. A. Bennett, for the Government.

F. A. BENNETT, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

#### Direct Examination.

My name is F. A. Bennett. I am manager of the Western Union Telegraph Company at San Diego, (Testimony of F. A. Bennett.)

California. Have been such since April 19, 1912. I know the defendant, Miller. He had a charge account with the company in San Diego. I have the card that he opened the charge account by. It is not customary to charge telegrams in the Western Union, unless a person has opened an account. The card is not signed by Mr. Miller. I wrote the card myself. I wrote the card at his request and in his presence. It is one of the regular records kept by my company regarding charge accounts.

Mr. MOODY.—I offer this as United States Exhibit No. 1.

Mr. RUSH.—We object to the introduction of the card on the ground it is hearsay and not the best evidence.

The COURT.—Objection overruled. [52]

Plaintiff's Exhibit No. 1—Charge Card Issued to J. B. Miller by Western Union Co.

(Typewritten:)

Miller & Couden (Pencil:) J.B. Victoria Apts., 10th & E St.

49 Camp, Exposition grounds.

Charge only messages signed by the following:
J. B. MILLER,

F. M. Couden,

FAB Jas. O'Donnell.

May 24, 1915. File 6.

(Pencil:) Changed to J. B. Miller only.

Mr. Miller requested to open it in his name, that he was not in partnership with Mr. Couden any more. That date was some time in November, I (Testimony of F. A. Bennett.)

don't remember the date. I cannot tell from the card. He gave his address as the Victoria Apartments. He did not give his telephone number, that I have any record or knowledge of. I first met him in the early part in 1915.

- Q. I will show you a telegram, which I will call United States Exhibit 2 for Identification, and ask you if that is a part of the records kept in the due course of business in your office in San Diego.
  - A. This was a part of your office records, yes, sir,
- Q. And what is that, without telling what is in it, what is it?
- A. It is a telegram that has been received by telephone. Somebody phoned that in to be sent. In San Diego.
  - Q. Was it sent? A. Yes, sir.
  - Q. What was the date that it was sent?
- A. It was filed November 15th, and sent November 16th. [53]
- Q. Can you tell from that record what number the telegram was phoned from?
  - A. Yes.
  - Q. What was the number it was sent from?

Mr. RUSH.—I object to that unless the witness himself knows, it is hearsay. The record of the telegraph company in San Diego is not an official record of any court, and is not to be considered as such.

Mr. RUSH.—A question on the objection, on the voir dire?

Q. (By Mr. RUSH.) You said you know what telephone it was phoned from?

(Testimony of F. A. Bennett.)

A. No, I can say from the record, what the record shows, I have no personal knowledge of it, other than that record. I did not receive the telephone message myself. I know the name of the clerk that took it. I only know that from the marks on the instrument I hold in my hand. I have no personal knowledge whatever of how the message came into the office, who sent it into the office, by whom it was received in the office, or where it was received from, except the marks I find on it, and the marks were not made in my presence, or under my personal observation or direction.

Mr. MOODY.—Q. Mr. Bennett, in due course of business in your company, if a message is phoned in, tell the jury what procedure is taken, what record is kept of that?

A. We have a special blank for copying telegram received over the telephone. On those blanks we are required to show the date, the telephone number from which it was phoned; the originating point is shown, the destination is shown, and the telegram is transcribed upon that blank. All these things appear to have been done, in this instance, in the telegram I hold in my hand. That is a regular record, kept in the course of business of my company. I have in my possession a record showing a bill rendered to Mr. Miller in the month of [54] November, 1915. It is a carbon copy of the bill rendered to Mr. Miller for the month of November, 1915. I can refer to my daily cash receipts record and tell

whether that bill was paid or not. I have that record with me.

Mr. MOODY.—I offer this as United States Exhibit No. 3 for Identification. (The paper was marked United States Exhibit No. 3 for Identification.)

Mr. MOODY.—The telegram was 2 for Identification. (The telegram was marked United States Exhibit No. 2 for Identification.)

By Mr. MOODY.—This is what, which you have handed me? A. A daily cash record.

Mr. MOODY.—This I offer as 4 for Identification. (The paper was marked United States Exhibit No. 4 for Identification.)

Q. (By Mr. MOODY.) Now, Mr. Bennett, I hand you United States Exhibits Nos. 2, 3 and 4, and ask you whether or not you can tell from your record whether the telegram known as United States Exhibit No. 2 was charged to Mr. Miller's account, and whether the same was paid for or not?

Mr. RUSH.—I object to that as incompetent, irrelevant and immaterial and no proper foundation laid, and hearsay.

The COURT.—I overrule the objection.

A. Yes.

The COURT.—Well, you can introduce them in evidence and have them explained.

Mr. MOODY.—I will offer the bill and the daily cash receipts in evidence, before I offer the telegrams—that is 3 and 4.

Mr. RUSH.—To each of them we object on the

ground that they are incompetent, irrelevant and immaterial and not the best evidence and hearsay. Before the Court rules I would like to ask the witness a few questions.

The COURT.—All right, proceed. [55]

Q. (By Mr. RUSH.) Mr. Bennett, those matters that you offered, for instance, that carbon copy of that bill, did you make that copy yourself?

A. No, sir. It was made by some other employee of the company. I did not make the charge on the books. All I know about it is simply what I find in the records. Personally, I didn't have anything to do with it. As far as I know the records are accurate; there is a slight chance that they may not be.

Mr. RUSH.—We submit the objection.

The COURT.—Are you the superintendent of the office?

A. I am the manager, the highest officer of the office. These records are kept under my supervision. We have a standard routine how they shall be kept. If these records were incorrect, from November down, I would have ascertained by this time whether or not they were correct. It is my opinion that they are correct. I have examined them. They are regular routine records. There are hundreds such records in the office. They are ordinarily kept correctly. I do not find very many mistakes in them.

The COURT.—I will overrule the objection.

Mr. RUSH.—Your Honor, may I ask just one question?

The COURT.—Yes, sir.

- Q. (By Mr. RUSH.) This record with reference to the cash, where it recites "J. B. Miller," is written on the line there in some handwriting which I take it is not yours? A. No, sir.
- Q. Which indicates that a bill charged against J. B. Miller for the amount of two dollars and some cents has been paid? A. Yes, sir.

I do not know anything about who paid that bill, and I can tell from my record who paid it. There is nothing from my record that shows who the bill was presented to. I don't know anything about who it was presented to. [56]

Mr. RUSH.—I submit the objection.

- Q. (By Mr. MOODY.) Did you have any other J. B. Miller on your charge account at that time?
  - A. No, sir.
- Q. (By the COURT.) This defendant was the man who had the account on your books by the name of J. B. Miller? A. Yes, sir.

The COURT.—Objection overruled.

Mr. RUSH.—Exception.

# Plaintiff's Exhibit No. 3—Bill for Telegrams for Month of November Issued to J. B. Miller.

J. B. Miller,

Victoria Apts.

	1			
Nov. 15.	To White	San Fran.	48	48
19.	" McMann, x	66	40	40
21.	" Mahon, x	"	1 21	1 21
x 23.	" White -	66	40	40
				2 49
			Tax	04

2 53

(In pencil)
Pd. Cash Dec. 9, 1915. [57]

## Plaintiff's Exhibit No. 4—Daily Cash Record of Western Union Telegraph Co.

THE WESTERN UNION TELEGRAPH COMPANY CASH RECEIVED

		CASH RECE	TAFID			
ollected by	At	S D	Office	Date	Dec. 9	, 191—
		legraph Revenue				
ame of Office Mon	Previous Months		for		undries	Total
700	Lievious Woutur	Current Month	Time Service			
Fe	0.45			-	1 73	
Inion Nat	2 45					
forden G	1 02					
K. Waffle House			1 00			
o. Title	1 07					
. B. Miller	<b>2</b> 53					
isso. Charaties	3 44					
Ars. Stewart		51				
V. H. Smith	76					
Coronado					7 12	
44					8 70	
J. D. T. Gty. Co.	72					
G. Scripps	3 09		U	. S. vs.		
F. Smith	2 43			No. 10	98 Crim.	
auto Club So. Cal	. 5 11			MILLER		
Veptun Sea F. Co.			P	l. Exhibit		
Vestern Salt	8 49			No. 4		
Vason & Co.	6 31		F	iled Nov. 2	2, 1916.	
Vm. S. Heink	1 01			WM. M. V		E. Clerk.
Bradley W.	8 67		В	y Geo. W.		
B. D. Elec.	4 29		_	,		Clerk.
. Kerman & S.	542	Nov. Er	ror		_ op acj	0101
D. M. C.	2	25			5 00	
I. S.	~	20			3 60	
Rex Belt					8 89	51
K. N.					1 52	01
4. 4.					. 02	

When Entering Cash Receipts from Branch Offices or Deposits Made by Branch Offices to the Credit of the Treasurer or Main Office Cashier, Place the Amount in the Total Column. 58]

Total

#### THE WESTERN UNION TELEGRAPH COMPANY

#### CASH RECEIVED

Collected by		At Collections of Telegraph Revenue		Offic	e Da	ate	191—	
				Collections				
Name of Office M					for	for Gold	Sundries	Total
		Previous M	lonths	Current Month	Time Service	and Stock		
Glenn Belt							53 95	
Grier S. W.			32					
Hemstock & D.		1	58					
Borsseree					1 62			
reseree								
H. A. Honsen		74	04					
Hathaway			51					
Carpenters		1	68					
Clayton W.			26					
H. J.							14 36	

When Entering Cash Receipts from Branch Offices or Deposits Made by Branch Offices to the Credit of the Treasurer or Main Office Cashier, Place the Amount in the Total Column. [59]

- Q. (By Mr. MOODY.) I show you United States Exhibit No. 2 for Identification, and ask you if that telegram is in all particulars as required by the rules of your company relative to those matters that you testified to, concerning taking the name of the party over the phone, the number, and to whom the account was to be charged? A. Yes, sir.
- Q. Is that one of the regular original telegrams as filed in your office in San Diego? A. Yes, sir.
- Q. (By the COURT.) Can you tell who in your office received that telegram?
- A. A former employee now, your Honor, one Harrington Shaw. The last I heard of him, he was in El Paso, Texas. He is the man that wrote out what is in this record of the receipt of the telegram. The bookkeeper that wrote the bill, her name is Miss Stetzel. She compiled the bill from the telegrams, and the other record was written by the cashier, who accounts for all the cash. Her name is Miss Naylor. The bookkeeper made that "48" on the corner of the telegram.
- Q. Well, has that "48" there on the telegram and this "48" on the bill got anything to do with each other?
- A. They are identical; that is, the bill was made up from this telegram.
- Q. This is the way you keep the record, keep the number of the telegram?
  - A. That is the amount of money that is due for it.
  - Q. That 48 cents is the amount of money?
  - A. Yes, sir.

The charge is always entered on the telegram and then transferred to the books. The date, the party addressed, the destination and the sender's name, Mr. Miller, and the fact is marked "Charge" over here in this corner, indicate that the [60] telegram is chargeable to J. B. Miller, as indicated in this book.

Whereupon an adjournment was taken until 10 o'clock A. M. Wednesday, November, 22, 1916, and at said time.

### Testimony of Myrl Stetzel, for the Government.

MYRL STETZEL, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

#### Direct Examination.

My name is Myrl Stetzel. I reside in San Diego and am a clerk for the Western Union, and was such in November, 1915.

- Q. I will show you a document which has been introduced in evidence here as United States Exhibit No. 3, and ask you if you recognize that document.
  - A. Yes, this is mine.
- Q. (By the COURT.) Did you make that out yourself?

A. Yes. It is a bill for telegrams for the month of November. It is a carbon copy. It is in my handwriting. The original was mailed and addressed to J. B. Miller, Victoria Apartments. I made this bill out from the telegrams on file in the office. It was made out last year. The document does not show what year it was made out. The date

was on the original bill, but not copied on the copy.

- Q. Where did you get this word here "To White"?
  - A. That is the party that the telegram is going to-
- Q. And what does this over here mean? (Indicating.)

  A. San Francisco, that is the city.
- Q. The city to where it was going. What are the figures over here on the right, "48"?
- A. That is the amount of money that was charged for sending the telegram.

The next item is on the 19th, to McMann, San Francisco, 40 cents; the next to Mahon, San Francisco, \$1.21, on the 20th and 21st; the next, on the 23d, to White, San Francisco, 40 cents. [61] That may have been either a telegram or a night letter. That charge on the bill is for the tax one cent on each telegram, the war tax. I don't know what that other business is down here; I didn't put it there. I did not put any other figures except what I have read.

The COURT.—Let me have those telegrams.

The COURT.—Has that telegram got anything to do with the copy of the paper you have in your hand?

A. This is the 15th; that is the first telegram on there. I made that entry from this document. The "48" is in my figures. I made that charge from this paper, probably the next day, I will say the next day after it bears date, on November 15th. I mailed out the original and mailed that to this address. The account is accurate and correct.

The COURT.—That is all I desire to ask her.

Mr. RUSH.—Q. This carbon copy you hold in your hand, this carbon copy of the bill, is simply a copy of that part of the bill that you wrote, is it?

- A. Yes, the bill as rendered; that is written in.
- Q. There was other printed matter on the bill that was rendered that does not appear on this carbon copy you have? A. Yes.
- Q. And the bill that was rendered had a date on it? A. Yes.
- Q. And this one does not. Now, when you went to make up this bill, you made it up from the telegram, what purports to be a telegram that you hold in your hand, did you? A. Yes, sir.
- Q. You don't know anything about where that telegram came from? You just found it among the files in the office, and following your usual course of business you made that bill from the information that was contained on that telegram, or purported telegram? May I see that just a moment? This instrument I refer [62] to as a telegram is the one that has been marked "United States Exhibit No. 2 for Identity" only. Now, where that came from, you don't know, other than that you found it in the records in your office?

  A. That is all.
- Q. You don't know who wrote it, nor how it got into the office?
  - A. Well, it was taken over the phone.
  - Q. What is that?
  - A. Is that what you want to know?

- Q. I am asking you, do you know of your own knowledge— A. No.
  - Q. How it got into the office? A. No.
- Q. All the knowledge you have of it is what you found on the bill itself; that is what I mean?
  - A. That is all I have to do with it.
- Q. You did not talk with anybody about it, or anyone tell you anything about it? A. No.
- Q. And the charge you made, so many cents, is the charge indicated on the telegram itself?
  - A. Yes.
- Q. And you had no personal information from any other source whatsoever as to the amount of the charge, or when it was made or anything else, except what you get from the telegram that you found in the files of the office? A. No, sir.
- Q. And that telegram, according to the rules of your office, indicates that it was telephoned into the office? A. Yes.

By the COURT.—Do you know whose handwriting the telegram is? [63]

- A. It is that of H. S. Shaw, one of the clerks.
- Q. (By Mr. MOODY.) Miss Stetzel, I will show you a telegram, or what purports to be a telegram, which I will call United States Exhibit No. 5 for Identification, and ask you if the same situation prevails as to that purported telegram as you have described that prevails in the case of the United States Exhibit No. 2 for Identification? In other words, did you take from the document the entries which you have in the bill which had been introduced

in evidence as United States Exhibit No. 3?

A. Yes, sir. I listed this telegram on this bill. The rate on the telegram is the same as the rate on the bill.

Q. Will you show me on the bill where you have listed that telegram?

A. (Indicating.) "11/23 White, San Francisco, 40 cents," and this U. S. Exhibit 5 for Identification was a part of the files of the office at that time.

### Testimony of Etta Naylor, for the Government.

ETTA NAYLOR, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

#### Direct Examination.

My name is Etta Naylor. I reside in San Diego and am cashier for the Western Union. Was acting as such during November and December of last year. This document you show me, being United [64] States Exhibit No. 4 is our cash register for December 9th. It is in my handwriting.

Q. I will show you a carbon copy of a bill which has been introduced in evidence as United States Exhibit No. 3, and ask you if you can show from the Exhibit No. 4 whether or not the exhibit No. 3, the bill, has been paid?

Mr. RUSH.—I object to that as incompetent, irrelevant and immaterial, and asking for a conclusion of the witness.

Mr. MOODY.—It is in her own handwriting, if the Court please.

(Testimony of Etta Naylor.)

A. Yes, sir, that is my handwriting, and it pays this bill.

The COURT.—The objection will be overruled.

I have no memory, independent of that, about the payment of that bill. Plaintiff's Exhibit No. 4 is kept correctly. I keep it, it is balanced daily. It is a correct statement of the receipts on that day. I can tell from looking at this daily cash register item that the other item here, \$2.53, appears upon that item upon that account, the daily cash register. It is here. It is the same item. I know this because the November bills are always paid in December. It corresponds exactly with the bill, and it was received the following month, and the amount is the same \$2.53 on both the bill and on the cash register. The accounts are generally correct. I did not write the few words written with a lead pencil at the bottom of the bill.

The COURT.—I think under the testimony, that these two items are admissible in evidence.

#### Cross-examination.

I have no independent recollection of the payment of that bill. All that I know about it is that I find it in the record kept by me, and the record shows it was paid. I assume that the \$2.53 is the amount of the bill for the month before, because it is the same amount. If another individual, or the same individual paid the same amount for some other purpose, it [65] would appear on my cash just the same. I do not know who paid that bill, and I have no knowledge of how it was paid. I haven't any

(Testimony of Etta Naylor.)

idea whether it was paid in cash or by check, or by what individual. I don't know how the bill went out to the person who paid it, if it ever did go out, because I don't handle that part of the work. All I know is what the record shows, and the record shows that on December 9th, J. B. Miller is credited with cash, \$2.53.

## Testimony of Louise Bordeau, for the Government (Recalled).

LOUISE BORDEAU, recalled on behalf of the prosecution, testified as follows:

I testified yesterday that Vida White and I left San Francisco on the day after Thanksgiving in 1915. We left by the Southern Pacific. We had through tickets to San Diego. Arrived there on the morning train, the following day. Mr. Miller was at the train, when Vida Rogers and I arrived at the depot, to meet us. Vida Rogers and I went and had a bite to eat. I saw her last on Third and Broadway, I believe, when she got into this auto stage. I saw the stage that she got into. It had a sign on it that said "To Tia Juana, Mexico."

I did not see Miller any other time that morning except at the train. He was there just a very few minutes. He talked with Vida White just a very few minutes. It was just "hello"; that is all I know.

#### Cross-examination.

I stayed in San Diego one night. I didn't stay there two days. I testified on the 8th day of March, 1916, before the Commissioner in reference to this (Testimony of Louise Bordeau.)

same matter. I remember the circumstances, the Commissioner being present and Mr. Gershon and others.

- Q. Did you at that time testify as follows: "Q. Did you travel all the way with Miss Vida White? A. Yes, sir, as far as San Diego, and I stayed here for two days."
- A. I didn't though. As I say, we got in in the morning [66] and I left San Diego the following day for Tia Juana.
- Q. And you were asked, "Where did you see her again?" And the answer: "At Tia Juana."
- A. Yes, sir.

A. Yes, sir. When I got to San Diego, I went to the San Diego Hotel. We got off the train at the Santa Fe depot and went over to the San Diego Hotel. We first went up to the Oyster Loaf together and had a bite to eat. I never left Miss White at all until she got on to the auto stage. I think she got on to the auto stage at Fourth and Broadway. It was right there by the U. S. Grant Hotel. I didn't stop at the San Diego Hotel. We wasn't registered at any hotel. We both went to the San Diego Hotel together. That night I stopped at the San Diego Hotel.

## Testimony of F. A. Bennett, for the Government (Recalled).

- F. A. BENNETT, recalled on behalf of the prosecution, testified as follows:
  - Q. I will show you a document which has been in-

troduced as United States Exhibit No. 5 for Identification, and ask you if you know what that is.

Mr. RUSH.—I object to that as calling for a conclusion of the witness, and incompetent, irrelevant and immaterial.

The COURT.—Don't state the contents of it.

- Q. (By Mr. MOODY.) Do you know what it is?
- A. A telegram received by—
- Q. Don't state the contents of it. Do you know; yes or no.

The COURT.—It is a telegram.

A. It is a telegram. I got it out of our office files at San Diego. It is the original record. It bears sending marks. It would not bear those marks if it were not sent.

Q. I will show you a record which will designate as United States Exhibit No. 6 for Identification, and ask you if you know what it is? [67]

A. A copy of a telegram. It is a record of our office in San Diego. It is a copy of a received message. It was received November 26th, 1915. It is a carbon copy of the original message made at the time the original was received. I have a record with me showing whether or not the telegram, or the original of which this is a carbon copy, was delivered in San Diego.

Mr. MOODY.—Mark that for identification as 7. Mr. MOODY.—Now, this No. 7 for identification is what, Mr. Bennett?

A. It is a delivery sheet for November 26th. It shows the delivery of telegram 451 in San Diego.

Mr. MOODY.—I offer that in evidence as United States Exhibit 7, together with the bond, as an exemplar of the signature of this defendant.

We object to the introduction of this instrument described as a delivery sheet, on the ground it is incompetent, irrelevant and immaterial and no proper foundation laid for its introduction and hearsay.

Mr. MOODY.—Probably I should offer, together with that, the United States Exhibit 6 for Identification, showing that that message was delivered to the defendant by this exhibit No. 7, the bond being the exemplar of the signature.

The COURT.—(after discussion) Well, I will sustain the objection to this bond, unless you prove that is his signature.

Mr. MOODY.—I renew the offer of the telegram, and the blank showing it was receipted for by J. B. Miller.

Mr. RUSH.—I object to the statement of counsel as to what it shows, as incompetent, irrelevant and immaterial, and not sustained by the evidence, and an unjustifiable assertion, in view of the evidence.

The COURT.—Well, I don't think that comment is justifiable by the paper, Mr. Moody. You have a right to an exception to that. [68]

The COURT.—The objection will be sustained.

Mr. MOODY.—At this time we desire to offer all the telegrams, United States Exhibits Nos. 5 and 2 for Identification, and offer them as exhibits at this time.

Mr. RUSH.—The defendant objects to the offer of those instruments, and each of them, on the ground they are incompetent, irrelevant and immaterial, that no proper foundation has been laid for their introduction, and that they are not the best evidence, and they are hearsay.

The COURT.—The objection will be sustained.

Mr. MOODY.—That is all, Mr. Bennett. The Government rests.

The COURT.—Well, now, over the objection of the defendant, a witness was permitted to testify to the contents of a telegram in the hands of Vida White at San Francisco. What do you desire to do with that for the defendant? It was admitted on certain representations made by the United States Attorney, which undoubtedly were made in good faith.

Mr. RUSH.—We move that that testimony of the witness Louise Bordeau, concerning and referring to a telegram, which she said she saw in the hands of Vida White, or Vida Rogers, in San Francisco—that all such testimony be stricken out, on the grounds stated in the objection at the time the objection was interposed to such testimony; and on the further ground that the proper foundation has not since been laid for the introduction of that testimony, and it has not been connected up with the defendant.

The COURT.—I will strike the evidence out concerning the contents of the telegram, as testified to by the witness; and I instruct you, gentlemen of the

jury, that you shall consider this case without considering that testimony, and shall not consider any testimony that has been stricken out. [69]

Mr. RUSH.—May it please the Court, the defendant at this time moves the Court to instruct the jury to find a verdict of not guilty, on the ground that there is not sufficient evidence to sustain a conviction for this offense upon this charge, or either count of it.

The COURT.—The motion will be denied.

Mr. RUSH.—We rest.

Thereupon the Court admonished the jury and a recess was taken until 2 o'clock P. M. of the same day, and thereupon the Court instructed the jury as follows:

The COURT.—Gentlemen of the jury, the defendant is indicted under an act to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes. The statute in so far as it is necessary for you to consider, reads as follows:

"that any person who shall knowingly persuade, induce, intice or coerce, or cause to be persuaded, induced, enticed or coerced, or aid or assist in persuading, inducing, enticing or coercing, any woman or girl to go from one place to another in interstate or foreign commerce for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of

such person that such woman or girl shall engage in the practice of prostitution or debauchery or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go or to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce," shall be deemed guilty of violating such statute.

You are instructed that before you can convict the defendant in this case, the proof must satisfy you beyond a [70] reasonable doubt of the following facts:

First, that the defendant did knowingly, unlawfully and wilfully persuade, induce or entice Vida White, alias Vida Rogers, to go from the city of San Fraincisco, California, or other place in the State of California, to the town of Tia Juana, Mexico.

Second, that in so going, the said Vida White, alias Vida Rogers, went upon the line or route of the Southern Pacific Railroad, a common carrier, from the city of San Francisco, California, in the course of her journey, and that she went by automobile stage, a common carrier, from the city of San Diego, California, to the town of Tia Juana, Mexico, and not otherwise. It is not necessary, I charge you, for the Government to show that she went all the way from the city of San Francisco to the City of San Diego on the Southern Pacific Railroad. The important thing in his connection is that she

traveled by a common carrier, engaged in foreign commerce, on her route after she had been persuaded, induced or inticed as aforesaid.

Third, that at the time the defendant so persuaded, induced or enticed said Vida White, alias Vida Rogers, to go to Tia Juana, Mexico, from the State of California, it was for the purpose of prostitution, debauchery, or some other immoral purpose of the same sort and kind; and that the defendant intended that Vida White, alias Vida Rogers, should and would, when and after she reached Tia Juana, in the Republic of Mexico, personally engage in prostitution, debauchery or some other immoral purpose of the same sort and kind. And I instruct you in this connection that if the said Vida White, alias Vida Rogers, was placed by the defendant in a house of prostitution in the city of Tia Juana, Mexico, for the purpose of having her remain therein, for the purpose of having her manage a house of prostitution, as landlady or superintendent thereon, that that is an immoral purpose within the meaning of the law.

It is not necessary for the Government to prove that the defendant paid any part of the expenses of said Vida White, [71] alias Vida Rogers, in going to said Tia Juana, Mexico.

You must not be prejudiced against the defendant because of the fact that he is charged with an offense, and you must not convict this defendant for fear that a crime may go unavenged, or for the purpose of deterring others from the commission of a like offense. You are instructed gentlemen, that you are the exclusive judges of the credibility of the witnesses whose testimony has been admitted in evidence herein, and of the effect and value of such evidence. Your power in his regard, however, is not arbitrary, but is to exercised with a legal discretion and in subordination to the rules of evidence. It is the province of the Court, under the law, to state to you the rules of law applicable to the case, and you in your deliberations will be guided by these rules so stated. It is your duty, unaided by the Court, to pass upon and decide the questions of fact.

Every witness is presumed to speak the truth, but this presumption may be repelled by the manner in which he or she testifies, by his or her appearance upon the stand, by the character of his or her testimony, or by the giving of false or perjured testimony by him or her, or by evidence affecting his or her character for truth, honesty or integrity, or by his or her motive, interest or bias, or by contradictory evidence.

A witness may be impeached by the party against whom he or she was called by contradictory evidence, by evidence that he or she had made at other times statements inconsistent with his or her present testimony, or by evidence that his or her general reputation for truth, honesty or integrity is bad. If you believe that any witness has been impeached, or that the presumption of truthfulness attaching to the testimony of such witness has been repelled, then you will give the testimony of such witness

such credibility, if any, as you may think it entitled to. You are not [72] bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against the presumption of other evidence satisfying your minds.

The defendant in this case has offered no testimony. He had a right to decline to offer any testimony and depend upon the failure of the Government to prove a case against him. He had a right to go upon the witness stand and testify in his own behalf if he chose to do so. The Government could not compel him to go, and he had a right to remain off the witness-stand. The law expressly provides that no presumption adverse to him is to arise from the fact, from the mere fact that he does not place himself upon the witness-stand. So in this case the mere fact that this defendant has not availed himself of the privilege which the law gives him should not be permitted by you to prejudice him in any way. It should not be considered as evidence either as to his guilt or innocence.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive evidence of an eye-witness to the commission of a crime. The other is testimony and proof of a chain of circumstances pointing sufficiently strongly to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans for the

commission of the crime,—in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. The law requires you to reconcile any and all circumstances that have been shown with the innocence of the defendant, if you can reasonably do so when all the evidence in the case in considered. And if it is possible for you to account for the acts of the defendant upon any other reasonable hypothesis than that of guilt, then it is your duty [73] to so account for them and to find him not guilty. Where the evidence is entirely circumstantial, and yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict.

The Court further instructs you that neither the finding of the indictment nor any allegation therein raises any presumption whatever against the defendant, but that the burden of proof is on the Government to establish the defendant's guilt, and that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; and this rule applies to every material element of the offense charged.

The Court further instructs you that a reasonable doubt is one which is reasonable in view of all the evidence; and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt. But if after such impartial comparison and consideration of all

the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

This case, like all cases triable in a court of justice, should be determined by the jury upon the evidence before them, and upon that alone, subject to the rules of law laid down for your guidance by the Court, and no juror acting conscientiously can base his verdict upon any other consideration. You should not speculate as to the existence of matters not introduced in evidence, and you should not indulge in suspicious or speculative theories outside of the evidence. In this connection you are instructed that juries are impaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so. It is true each juror must decide the matter for himself, yet he should do so [74] only after a consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his view or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others.

There are two counts in the indictment. You can find the defendant guilty of one and acquit him on the other; or you can find him guilty under both counts, or acquit him on both counts.

When you shall retire to consider your verdict, you shall elect one of your number foreman, who shall sign the verdict when you shall have agreed.

You cannot sign or return a verdict unless you all concur in the verdict.

Mr. RUSH.—Will your Honor direct that the usual exception be entered, or shall it be done later? I don't care to waive it.

The COURT.—Well, you may take such course as you—do you desire an exception now?

Mr. RUSH.—Yes, sir.

The COURT.—You better state your exception.

Mr. RUSH.—The defendant excepts to each and all the instructions given by the Court, other than those presented or suggested by the defendant, and to each and every amendment and modification of instructions proposed by the defendant, and to the refusal to give each instruction proposed by the defendant and not given by the Court.

Thereupon the bailiff was sworn by the clerk and the jury retired in charge of the bailiff at 2:20 o'clock, P. M.

The jurors returned into court at 4:40 P. M. when the following additional proceedings were had, to wit:

The COURT.—I have a note, presented to me by the bailiff in charge of the jury, reading as follows:

"Can the jury construe a mutual agreement to be persuasion or inducement? L. J. Bradford, Foreman." [75]

Do you desire an instruction on that subject, gentlemen.

The FOREMAN.—We do.

The COURT.—The statute, as I read it to you, reads that "Any person who shall knowingly, per-

suade, induce, entice or coerce, or cause to be persuaded, induced, enticed or coerced, or aid or assist in persuading, inducing, enticing or coercing, any woman," and so forth.

It is entirely proper for me to instruct you on the subject on which you inquire.

Now according to the Standard dictionary, one of the definitions of the words "induce" is "to lead in, to introduce. Second, to draw on, to overspread. Third, to lead on, to influence, to prevail on, to incite, to move by persuasion or influence. Fourth, to bring on, to effect, a cause; as a fever induced by fatigue or exposure." The synonyms of this word are: "To move, instigate, urge, impel, incite, press, influence, actuate."

The word "persuade" means: "To influence or gain over by argument, advice, entreaty, expostulation; to draw or incline to a determination by presenting sufficient motives. Second, to try to influence. Third, to convince by argument or by reasons offered or suggested from reflection; to cause to believe. Fourth, to inculcate by argument or expostulation, to advise, to recommend." Synonyms: "To convince, induce, prevail on, win over, allure, entice."

Now in the Law Dictionary, the word "inducement" in contracts is "That the benefit or advantage which the promissor is to receive from the contract is the inducement to make it."

In criminal evidence it is "The motive which leads or tempts to the commission of crime."

Now, with those definitions in mind concerning

these words, I instruct you that a consideration for entering into an [76] agreement is an inducement to enter into the agreement. I think probably you understand the situation now.

The FOREMAN.—Your Honor, we would like to have the two indictments read, so we may understand the both of them, one separated from the other. We were not quite sure.

The COURT.—Yes, you may read the indictments. Whereupon the indictment was read by the clerk and the jury again retired at 5 o'clock P. M.

That the exception of the defendant to the giving to the jury of the above instruction, by the Court, was thereafter allowed and entered by the Court, on the day of the making of the motion for a new trial, as appears by the minutes of the Court.

The Court refused to give to the jury the following instructions requested by the defendant, to which refusal the defendant objected and excepted;

#### Instruction No. 19.

You are instructed that before you can suffer yourselves to convict the defendant in this case, you must be satisfied by proof beyond all reasonable doubt, of the following facts:

First. That the defendant, Miller, did knowingly, unlawfully and wilfully persuade, induce or entice Vida White, alias Vida Rogers, to go from the city of San Francisco, California, to the town of Tia Juana, Mexico;

Second. That in so going said Vila White, alias Vida Rogers, went upon the line or route of the Southern Pacific Railroad Company, a common car-

rier, from the city of San Francisco, California, to the city of San Diego, California, and via automobile stage, a common carrier, from the city of San Diego, California, to the town of Tia Juana, Mexico, and not otherwise.

Third. That at the time the defendant so persuaded, induced or entired said Vido White, alias Vida Rogers, to go from San Francisco, California, to Tia Juana, Mexico, it was for the purposes of prostitution, debauchery, or some other immoral purpose of the same sort and kind. [77]

If the Government has failed to prove any of the elements above set forth, beyond all reasonable doubt, it is your duty and you should find the defendant not guilty.

#### Instruction No. 20.

You are instructed that unless you are satisfied from the evidence beyond a reasonable court that the defendant intenced that Vida White, alias Vida Rogers, should and would, when and after she reached Tia Juana, in the Republic of Mexico, personally engage in prostitution or debauchery, or some other immoral practice of the same sort and kind, you should acquit the defendant.

#### Instruction No. 21.

It is not sufficient to warrant a conviction of the defendant that he intended that Vida White, alias Vida Rogers, should after she reached Tia Juana, in the Republic of Mexico, act as landlady or house-keeper in a house of prostitution, or manage or operate such a house, unless it was the intention of the defendant that said Vida White, alias Vida Rogers,

should, as a result of leading such a life, eventually give herself up to a condition of debauchery which would eventually lead to a course of sexual immorality on her part.

#### Instruction No. 1.

The Court deeming the evidence in this case insufficient to warrant a conviction of the defendant, instructs the jury to acquit him.

#### Instruction No. 5.

You are instructed that the law presumes the defendant to be innocent, and that every presumption of the law is in favor of his innocence, and it is not your duty to look for some theory upon which to convict the defendant, but on the contrary, it is your duty, and the law requires you to reconcile any and all [78] circumstances that have been shown with the innocence of the defendant, if you can reasonably do so, when all the evidence in the case is considered, and if it is possible for you to account for the acts of the defendant upon any other reasonable hypothesis than his guilt, then it is your duty to so account for it and to find him not guilty.

#### Instruction No. 7.

In considering the evidence if you can reasonably account for any fact in this case on a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to do so and reject any theory or supposition on which it might point to his guilt, even though such theory admits of his innocence.

#### Instruction No. 9.

If the evidence relating to any circumstance in this

case is, in view of all the evidence, susceptible of two interpretations, one of which would point to the defendant's guilt and the other which would admit of his innocence then it is your duty in considering such evidence to adopt that interpretation which will admit of defendant's innocence and reject that which would point to his guilt.

#### Instruction No. 12.

You are instructed that the defendant in this case is entitled to the individual opinion of each member of this jury and that no member of this jury should vote for the conviction of the defendant because of the opinion of the other members of the jury, as long as he, himself, has a reasonable doubt as to the guilt of the defendant, and should refuse to vote for the conviction of the defendant, notwithstanding any contrary opinion that the other members of the jury may entertain, so long as he, himself, has a reasonble doubt of the guilt of the defendant.

#### Instruction No. 13.

The Court instructs you that your personal opinions as [79] to the facts not proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors, you can only act upon the evidence introduced upon the trial and from that, and that only, you must form your verdict.

#### Instruction No. 14.

You are instructed that mere probabilities are not sufficient to warrant a conviction of the defendant, nor is it sufficient that the greater weight or preponderance of the evidence supports the charge against him; nor that upon the doctrine of chances it is more probable that the defendant is guilty than innocent; but to warrant a conviction of the defendant, he must be proven to be guilty so clearly and conclusively that there is no reasonable theory under the law and the evidence upon which he can be innocent.

#### Instruction No. 18.

In order to convict the defendant upon circumstantial evidence, it is necessary not only that the circumstances concur to show that he committed the crime charged but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proven coincide with, account for and render probable the guilt of the defendant, but they must exclude to a moral certainty every other reasonable theory but the single one of guilt, or the jury must find the defendant not guilty.

And the objections and exceptions of the defendant to the refusal of the Court to give to the jury each of the foregoing instructions, were taken as hereinabove set forth. [80]

That thereafter, to wit, at about the hour of 5:02 o'clock P. M. on said day, the jury returned duly and regularly into court their verdict finding the said defendant not guilty as charged in the first count of the indictment and guilty as charged in the second count of the indictment, with recommendation for leniency.

That the time for sentencing said defendant was thereupon duly continued by the Court from time to time until the 1st day of December, 1916, upon which date the said defendant filed in said court his motion

for a new trial. That thereupon on said date, the Court duly and regularly heard the motion of said defendant for a new trial and duly and regularly made its order denying said motion, to which ruling the exception of the defendant was duly made and entered, and thereupon, on the same day, defendant filed his motion in said court in arrest of judgment and the Court thereupon heard the same and duly and regularly made its order denying the said motion in arrest of judgment, to which ruling the exception of the defendant was duly made and entered, and thereupon the Court continued the time for pronouncing judgment in said case from time to time until the 12th day of December, 1916, at which time the Court duly and regularly pronounced sentence upon the defendant, adjudging that he pay a fine in the sum of one thousand dollars and be imprisoned in the Federal Penitentiary, at McNeil Island, for the period of one year and one day, to which sentence, the exception of the defendant was duly taken and allowed.

Thereupon, on the said 12th day of December, 1916, the defendant duly and regularly filed in said court his petition for a writ of error, and concurrently therewith his assignment of errors. That the Court at said time allowed said writ of error and fixed a supersedeas bond upon appeal in the sum of \$2500, to be duly given by the said defendant. That thereafter, to wit, [81] on the 15th day of December, 1916, said defendant gave and filed in said court his said supersedeas bond in the said sum of \$2500, which was duly approved and allowed by said Court.

That thereupon on said 15th day of December, 1916, a writ of error duly issued in said cause, returnable before the United States Circuit Court of Appeals, for the Ninth Circuit. That thereupon upon said date, citation on said writ of error duly issued, served upon the United States District Attorney and filed with the clerk of said court.

The indictment, demurrer, order overruling the demurrer, petition for writ of error, assignment of errors and the various orders and proceedings of the Court referred to herein, are fully set out in the printed record on appeal of the clerk to be filed herein and ordered to be printed herewith.

## Presentation of Bill of Exceptions, Notice Thereof and Stipulation for Settlement and Allowance.

The defendant, James B. Simpson, sometimes otherwise known as James B. Miller, hereby presents the foregoing as his bill of exceptions herein and respectfully asks that the same may be allowed.

## JUD R. RUSH, ALFRED F. MacDONALD,

Attorneys for Defendant.

To Albert Schoonover, Esq., United States District Attorney for the Southern District of California:

You will please take notice that the foregoing constitutes and is the proposed Bill of Exceptions of the defendant in the above-entitled action, and that said defendant will ask the allowance of the same.

JUD R. RUSH,
ALFRED F. MacDONALD,
Attorneys for Defendant. [82]

Service of the foregoing Bill of Exceptions is hereby acknowledged this 28th day of December, 1916.

CLYDE R. MOODY,

Asst. U. S. Atty., Attorney for the U. S. A.

### Stipulation as to Correctness of Bill of Exceptions.

It is hereby stipulated that the foregoing Bill of Exceptions is correct, and that the same be settled and allowed by the Court.

JUD R. RUSH,
ALFRED F. MacDONALD,
Attorneys for Defendant.
CLYDE R. MOODY,

Asst. United States Attorney, Attorney for the United States of America.

### Order Allowing Bill of Exceptions and Making Same Part of the Record.

The foregoing Bill of Exceptions, having been duly presented to the Court, the same is hereby duly allowed and signed and made a part of the records in this cause.

Dated this 28 day of December, 1916.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: Original. No. 1098—Crim. In the United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff, vs. James B. Simpson, indicted as James B. Miller, Defendant. Bill of Exceptions. Received Copy of within Bill of Exceptions this —day of December, 1916. Clyde R. Moody, Asst. U. S.

Atty., Attorney for Plaintiff. Filed Dec. 28, 1916. Wm. M. Van Dyke. Clerk. By Murray C White, Deputy Clerk. Jud R. Rush & Alfred F. MacDonald, 600 Bryson Building, Los Angeles, California, Attorneys for Defendant. [83]

In the District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

#### Petition for Writ of Error.

Your petitioner, James B. Simpson, indicted as James B. Miller, defendant in the above-entitled cause, brings this, his petition for a writ of error to the District Court of the United States, in and for the Southern District of California, and in that behalf your petitioner says:

That on the 12 day of December, 1916, there was made, given and rendered in the above-entitled court and cause a judgment against your petitioner whereby your petitioner was adjudged and sentenced to a fine of \$1,000 and imprisonment in the penitentiary at McNeil Island for a period of one year and one day, and your petitioner says that he is advised by his counsel and avers that there was and is manifest error in the records and proceedings had in said cause, and in the making, giving and entry of such

judgment and sentence, to the great injury and damage of your petitioner, and each and all of which errors will be more fully made to appear by an examination of said records, and by an examination of the Bill of Exceptions to be hereafter by your petitioner tendered and filed, and the assignment of errors which is filed with this petition, and to that end that the judgment, sentence and proceedings may be reviewed by the United States [84] cuit Court of Appeals for the Ninth Circuit, and our petitioner prays that writ of error may be issued directed therefrom to the said District Court of the United States, for the Southern District of California, Southern Division, returnable according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto a true copy copy of the record, Bill of Exceptions, Assignment of Errors, and all proceedings had and to be had in said cause, and that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner makes the assignment of errors filed herewith, upon which he will rely, and will be made to appear by a return of the said record, in obedience to said Writ.

WHEREFORE, your petitioner prays the issuance of a writ as herein prayed, and that the assignment of errors filed herewith may be considered as his assignment upon the Writ, and that the judgment rendered in this cause may be reversed and

held for naught, and that said cause be remanded for further proceedings, and that he be awarded a supersedeas upon said judgment, and all necessary process, including bail.

> JAMES B. SIMPSON, JAMES B. MILLER.

ALFRED F. MacDONALD, JUD R. RUSH,

Attorneys for Defendant. [85]

[Endorsed]: Original. No. 1098. In the United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff, vs. James B. Simpson, Indicted as James B. Miller, Defendant. Petition for Writ of Error. Received Copy of within Petition this 12th day of December, 1916. Clyde R. Moody, Asst. U. S. Atty., Attorney for Plaintiff. Filed Dec. 12, 1916. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Jud R. Rush, Alfred F. MacDonald, Attorneys for Defendant. [86]

In the District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

## Assignment of Errors.

Comes now James B. Simpson, indicted as James B. Miller, the defendant above named, and files the following statement and assignment of errors upon which he will rely upon the prosecution of a writ of error in the above-entitled cause, a petition for which writ on behalf of said defendant is filed at the same time with this assignment.

T.

The Court erred in overruling the demurrer of the defendant to the indictment in said cause, and to each and every count thereof, for the following reasons:

- (a) That said indictment does not, nor does any count thereof, state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or statutes of the United States of America.
- (b) That said indictment, and each of the counts therein contained, and particularly the second count thereof is not direct or certain as respects the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.
- (c) That said indictment, and each of the counts therein [87] contained, and particularly the second count thereof, is not direct or certain sufficiently to inform the defendant of the particular circumstances of the offense with which he is attempted to be charged, and is insufficient, uncertain and indefinite to such an extent that the defendant was not

advised thereby of the nature of the charges against him so that he might properly prepare and submit defenses thereto.

And the defendant's exception to the overruling of said demurrer was duly taken and allowed.

#### II.

The Court erred in overruling the objection of the defendant to the questions propounded to the witness, Louise Bordeau, in reference to the contents of a telegram received by Vida White, in San Francisco, California, and shown to said witness, which questions, objections, answers and exceptions are as follows:

Q. I will exhibit to you a telegram, which I will call United States Exhibit 1 for identification, and I will ask you if that is the wording of the telegram that you say that this woman received?

Mr. RUSH.—Just a moment. I object to that question as incompetent, irrelevant and immaterial.

The COURT.—I think the "wording," Mr. Moody,
—if that is the telegram—

Mr. MOODY.—Your Honor, it is impossible to produce the typewritten telegram which is delivered to a woman, but the telegram which is filed, and which can subsequently be proven to have been filed,—if this woman can testify that that is the same wording that she saw at that time, then it would be a sufficient connection of the telegram.

The COURT.—If you want to introduce a copy, you will have to show that you cannot produce the original. [88]

Mr. MOODY.—This is the original; this is not a

copy. This is the one which was filed for record, and which was sent, which was filed in San Diego. This is not a copy.

Mr. RUSH.—I want to add to my objection the further ground that it calls for hearsay.

The COURT.—Now, do you propose to prove that you cannot get the copy, or the original, whichever it may be designated?

Mr. MOODY.—I propose to show that the woman, Vida Rogers is without the jurisdiction of this court.

The COURT.—And that she has got that telegram?

Mr. MOODY.—That is impossible for us to say. The last time we had any information about it, she had it. But she is now without the jurisdiction of the Court, and the process of this court will not reach her.

The COURT.—You are going to prove that?

Mr. MOODY.—I will prove that by this witness.

The COURT.—I think you better prove that first, Mr. Moody.

Mr. MOODY.—Do you know where Vida Rogers is at the present time?

A. I believe she is in Tia Juana.

Q. When did you see her in Tia Juana last?

A. It was about in July, was the last time I was over there.

Q. And she was there at that time?

A. She was there at that time.

Q. Have you seen her since?

Mr. RUSH.—When was that?

Mr. MOODY.—In July of this year.

The COURT.—July of this year you are speaking about?

A. Yes, sir.

Mr. MOODY.—Q. Have you seen her since?

A. No, I have not. [89]

- Q. Have you seen her in the United States since last November? A. Oh, yes, sir.
- Q. When was the last time you saw her in the United States?
- A. Well, it was some time right after the floods; I don't remember just when.
  - Q. The last January floods? A. Yes.
- Q. And since that time you have seen her in the United States? A. No.

Mr. MOODY.—Now, if the Court desires at this time any further evidence on the whereabouts of the woman, Vida Rogers, I can produce such testimony and withdraw this witness.

The COURT.—Well, I will not require you to withdraw her. Upon your representation that you expect to do it, I will permit the evidence, and I will strike it out if you fail to produce the evidence.

Mr. RUSH.—Your Honor, before your Honor rules will you permit me to suggest one matter, and that is this:—I do it because I don't think your Honor apprehends the point of my objection. Before it can be shown that a telegram was received in San Francisco by this woman, or by anyone, it must be shown a telegram was sent.

Mr. MOODY.—I am not going to introduce this telegram into evidence.

The COURT.—Wait a minute, Mr. Moody. One at a time.

Mr. RUSH.—And before it can be proven that the telegram was sent it must be proven it was sent by this defendant. So to show this woman a writing, or what purports to be a copy—not the thing that she saw there, but something containing the same language that she saw there,—and ask her to refresh her memory [90] from that, and say that is the same language that was in the telegram that she saw in San Francisco, in any event would not be competent. She can only refresh her recollection from memoranda that she made herself. She cannot refresh her recollection from memoranda made by someone else, and which she, herself did not see made and never saw before this time. This, at the most, would be simply a memorandum of what the operator in the town from which it was sent, sent, and is not the identical object that she saw.

The COURT.—Isn't that so, Mr. Moody, that she can only refresh her memory and testify she has either got to testify from memory, or from memoranda which she made herself?

Mr. MOODY.—The reason why I didn't ask her was because I did not desire that this woman should testify what was in the telegram she saw in San Francisco—which she can testify from memory after it is shown that the telegram, or the party whose custody it was, is now without the jurisdiction of the Court—until after this telegram had been introduced in evidence; and I was only attempting at this time to present this telegram in the record for the pur-

pose of identification by this witness. If the Court desires, I can ask her what was in that telegram.

The COURT.—I think you better proceed that way, from her own memory.

Mr. MOODY.—Q. You say this woman received a telegram in San Francisco just prior to the time that you and she left there, is that right?

- A. Yes, sir.
- Q. Do you remember about what date it was that she received the telegram?
  - A. No, sir, I couldn't tell you that, the day.
- Q. Well, about how long was it before the day after [91] Thanksgiving, the day upon which you said you left?
  - A. It must have been—Oh, close on to three weeks.
- Q. About three weeks before you left that she received this telegram? A. Yes, sir.
- Q. Do you recall at this time—Do you recall whether or not Vida Rogers showed you the telegram and whether you read the telegram that she received, the first one?

  A. Yes, sir.
- Q. And do you recall at this time the substance of that telegram?
  - A. Well, perhaps not word for word.
  - Q. But do you recall the substance of it?
  - A. Yes, sir.
  - Q. What was the substance of it?

Mr. RUSH.—We object to that as incompetent, irrelevant and immaterial, and no proper foundation laid and hearsay.

The COURT.—Well, on the promise of the United States attorney that they will show that the recipient

of the telegram is not in the jurisdiction of the Court, the objection will be overruled.

Mr. RUSH.—We except to the ruling of the Court.

Q. Now, will you kindly state the wording of the contents of the telegram, as you remember it?

A. It was about a house with a dance-hall, kitchen and bar and five rooms in connection. "Looks like a good proposition. Will finance everything. Will split fifty-fifty."

The testimony of the witness in reference to the contents of the telegram was thereafter, upon failure of the Government to show that its recipient was not in the jurisdiction of the court, and upon motion of the defendant that said evidence was incompetent, irrelevant and immaterial, not the best evidence, [92] hearsay and no proper foundation laid, stricken out, but the defendant hereby assigns its admission in evidence as error for the reason that it was so highly prejudicial in its character, that in view of all the other evidence in the case, it is shown that by its admission, the jury were led to convict the defendant by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause.

#### III.

The Court erred in overruling the objection of the defendants to the following question propounded by the plaintiff to the witness, Louise Bordeau:

- Q. Before you went to Tia Juana, did Vida Rogers receive any other telegram, if you know?
  - A. She received one other.
  - Q. About how long after the first one came?

- A. It must have been two weeks after the first one came.
  - Q. And how long before she left San Francisco?
  - A. Just a very few days.
    - Q. Did you see that telegram?
    - A. Yes, sir.
    - Q. Did you read it? A. Yes, sir.
- Q. Do you recall at this time what that telegram said? A. Yes, sir.
  - Q. What did it say?

Mr. RUSH.—We object to that on the ground it is incompetent, irrelevant and immaterial, no proper foundation laid, not the best evidence, and calls for hearsay.

The COURT.—The objection will be overruled.

Mr. MOODY.—Q. What did that telegram say, as near as you can recall at this time?

A. "Everything ready. Leave Thursday or Friday," I believe it was. [93]

Q. Do you remember by whom it was signed?

A. "Jim."

The testimony of the witness in reference to the contents of the telegram was thereafter, upon failure of the Government to show that its recipient was not in the jurisdiction of the Court, and upon motion of the defendant that said evidence was incompetent, irrelevant and immaterial, not the best evidence, hearsay and no proper foundation laid, stricken out, but the defendant hereby assigns its admission in evidence as error for the reason that it was so highly prejudicial in its character, that in view of all the other evidence in the case it is shown

that by its admission the jury were led to convict the defendant by reason of passion and prejudice, and upon the testimony erroneously admitted, and not upon the legal evidence introduced at the trial of said cause. And the exception of the defendant to such objection and ruling of the Court was duly taken and allowed.

#### IV.

The Court erred in denying the defendant's motion to instruct the jury to bring in a verdict of not guilty, and to find the defendant "Not Guilty," at the conclusion of the case presented by the plaintiff, to the denial of which motion and to the ruling of the Court denying said motion, the defendant's exception was duly taken and allowed.

#### V.

The Court erred in rendering its judgment in this cause against the defendant for the reason that the indictment in said cause does not charge the defendant with any offense against or violation of the laws of the United States of America.

### VI.

The Court erred in rendering its judgment in this cause against the defendant for the reason that the evidence introduced at the trial of said cause was not sufficient to justify the [94] verdict of the jury therein, or the judgment of the Court against the defendant.

## VII.

The Court erred in rendering its judgment in this cause against the defendant for the reason that the testimony did not show or tend to show that the de-

fendant had committed any offense set out or attempted to be set out in the indictment.

#### VIII.

The Court erred in rendering its judgment in this cause against the defendant, for the reason that the testimony introduced at the trial of said cause did not tend to connect the defendant with the commission of any offense set out in the indictment.

#### IX.

The Court erred in rendering its judgment in this cause against the defendant, for the reason that the testimony introduced at the trial of said cause did not show, or tend to show that the defendant did knowingly persuade, induce and entice Vida Rogers to go from one place to another in foreign commerce.

#### X.

The Court erred in giving the following instruction to the jury:

"Gentlemen of the Jury: The defendant is indicted under an Act to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes. The statute, in so far as it is necessary for you to consider, is as follows: 'That any person who shall knowingly persuade, induce, entice or coerce or cause to be persuaded, induced, enticed or coerced, or aid or assist in persuading, inducing enticing or coercing any woman or girl to go from one place to another in interstate or foreign commerce—for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the

part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral [96] practice, whether with or without her consent, and who shall thereby knowingly cause, or aid or assist in causing such woman or girl to go and to be carried, or transported as a passenger upon the line or route of any common carrier or carriers, in interstate or foreign commerce, shall be deemed guilty of a violation of said statute.'

You are instructed that before you can convict the defendant in this case, the proof must satisfy you beyond a reasonable doubt of the following facts:

First. That the defendant did knowingly, unlawfully and wilfully persuade, induce or entice Vida White, *alias* Vida Rogers, to go from the city of San Francisco, California, or other place in the State of California, to the town of Tia Juana, Mexico;

Second. That in so going, the said Vida White, alias Vida Rogers, went upon the line or route of the Southern Pacific Railroad Company, a common carrier from the city of San Francisco, in the course of her journey, and that she went by automobile stage, a common carrier from the city of San Diego, California, to the town of Tia Juana, Mexico, and not otherwise.

It is not necessary, I charge you, for the Government to show that she went all the way from the city of San Francisco to the city of San Diego on the Southern Pacific Railroad. The important thing in this connection is that she traveled by a common car-

rier, engaged in foreign commerce on her route, after she had been persuaded, induced or enticed, as aforesaid.

Third. That at the time the defendant so persuaded, induced or enticed said Vida White, alias Vida Rogers to go to Tia Juana, Mexico, from the State of California, it was for the purpose of prostitution, debauchery, or some other immoral purpose of the same sort and kind, and that the defendant intended that Vida White, alias Vida Rogers, should and would, when and after she reached Tia Juana, in the Republic of Mexico, personally engage in prostitution, debauchery, or some other immoral practice of the same sort and kind. And I instruct you in this connection that if the said Vida White, alias Vida Rogers, was [97] placed by the defendant in a house of prostitution in the town of Tia Juana, for the purpose of having her remain therein, and for the purpose of having her manage a house of prostitution as landlady or superintendent, that that is an immoral purpose within the meaning of the law. It is not necessary for the Government to prove that the defendant paid any part of the expenses of the said Vida White, alias Vida Rogers, in going to said Tia Juana, Mexico."

To the giving of which instruction the exception of the defendant was duly taken and allowed.

#### XI.

The Court erred in giving to the jury, in compliance with a note, presented to the Court by the bailiff in charge of jury, reading as follows:

"Can the jury construe a mutual agreement to be

persuasion or inducement? L. J. Bradford, Foreman," the following instruction:

The COURT.—The statute, as I read it to you, reads that "Any person who shall knowingly persuade, induce, entice or coerce, or cause to be persuaded, induced, enticed or coerced, or aid or assist in persuading inducing, enticing or coercing, any woman," and so forth.

It is entirely proper for me to instruct you on the subject on which you inquire.

Now, according to the Standard Dictionary, one of the definitions of the word, "induce" is "to lead in, to introduce. Second, to draw on, to overspread. Third, to lead on, to influence, to prevail on, to incite, to move by persuasion or influence. Fourth, to bring on, to effect, to cause; as a fever induced by fatigue or exposure." The synonyms of this word are "to move, instigate, urge, impel, incite, press, influence actuate." [98]

The word "persuade" means: "To influence or gain over by argument advice, entreaty, expostulation; to draw or incline to a determination by presenting sufficient motives. Second, to try to influence. Third, to convince by argument, or by reasons offered or suggested from reflection; to cause to believe. Fourth, to inculcate by argument or expostulation, to advise, to recommend." Synonyms: "to convince, induce, prevail on, win over, allure, entice."

Now, in the Law Dictionary the word "inducement" in contracts is "that the benefit or advantage which the promisor is to receive from the contract is

the inducement to make it."

In criminal evidence it is, "the motive which leads or tempts to the commission of crime."

Now, with those definitions in mind concerning these words, I instruct you that a consideration for entering into an agreement is an inducement to enter into the agreement. I think probably you understand the situation now.

To the giving of which instruction the exception of the defendant was duly taken and allowed.

#### XII.

The Court erred in refusing to give the jury the following instruction requested by the defendant, to which refusal the defendant objected and excepted.

You are instructed that before you can suffer yourselves to convict the defendant in this case, you must be satisfied by proof beyond all reasonable doubt of the following facts:

First. That the defendant, Miller, did knowingly, unlawfully and wilfully persuade, induce or entice Vida White, alias Vida Rogers, to go from the city of San Francisco, California, to the town of Tia Juana, Mexico;

Second. That in so going said Vida White, alias Vida Rogers went upon the line or route of the Southern Pacific Railroad [99] Company, a common carrier, from the city of San Francisco, California, to the city of San Diego, California, and via automobile stage, a common carrier from the city of San Diego, California, to the town of Tia Juana, Mexico, and not otherwise.

Third. That at the time the defendant so persuaded, induced or enticed said Vida White, alias Vida Rogers to go from San Francisco, California, to Tia Juana, Mexico, it was for the purposes of prostitution, debauchery, or some other immoral purpose of the same sort and kind.

If the Government has failed to prove any of the elements above set forth, beyond all reasonable doubt, it is *is* your duty and you should find the defendant not guilty.

You are instructed that unless you are satisfied from the evidence beyond a reasonable doubt that the defendant intended that Vida White, alias Vida Rogers, should and would, when and after she reached Tia Juana, in the Republic of Mexico, personally engage in prostitution or debauchery, or some other immoral practice of the same sort and kind, you should acquit the defendant.

It is not sufficient to warrant a conviction of the defendant that he intended that Vida White, alias Vida Rogers, should after she reached Tia Juana, in the Republic of Mexico, act as landlady or house-keeper in a house of prostitution, or manage or operate such a house, unless it was the intention of the defendant that the said Vida White, alias Vida Rogers, should as a result of leading such a life, eventually give herself up to a condition of debauchery which would eventually lead to a course of sexual immorality on her part.

The Court, deeming the evidence in this case insufficient to warrant a conviction of the defendant, instructs the jury to acquit him.

You are instructed that the law presumes the defendant [100] to be innocent, and that every presumption of the law is in favor of his innocence, and it is not your duty to look for some theory upon which to convict the defendant, but on the contrary, it is your duty, and the law requires you to reconcile any and all circumstances that have been shown with the innocence of the defendant, if you can reasonably do so, when all the evidence in the case is considered, and if it is possible for you to account for the acts of the defendant upon any other reasonable hypothesis than his guilt, then it is your duty to so account for it and to find him not guilty.

In considering the evidence if you can reasonably account for any fact in this case on a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to do so, and reject any theory or supposition on which it might point to his guilt, even though such theory admits of his innocence.

If the evidence relating to any circumstance in this case is, in view of all the evidence, susceptible of two interpretations, one of which would point to the defendant's guilt and the other which would admit of his innocence, then it is your duty in considering such evidence to adopt that interpretation which will admit of defendant's innocence and reject that which would point to his guilt.

You are instructed that the defendant in this case is entitled to the individual opinion of each member of this jury and that no member of this jury should vote for the conviction of the defendant because of the opinion of the other members of the jury, as long as he, himself, has a reasonable doubt as to the guilt of the defendant, and should refuse to vote for the conviction of the defendant, notwithstanding any contrary opinion that the other members of the jury may entertain, as long as he, himself, has a reasonable doubt of the guilt of the defendant. [101]

The Court instructs you that your personal opinions as to the facts not proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors, you can only act upon evidence introduced upon the trial, and from that, and that only, you must form your verdict.

You are instructed that mere probabilities are not sufficient to warrant a conviction of the defendant, nor is it sufficient that the greater weight or preponderance of the evidence supports the charge against him; nor that upon the doctrine of chances it is more probable that the defendant is guilty than innocent; but to warrant a conviction of the defendant, he must be proven to be guilty so clearly and conclusively that there is no reasonable theory under the law and the evidence upon which he can be innocent.

In order to convict the defendant upon circumstantial evidence, it is necessary not only that the circumstances concur to show that he committed the crime charged, but that are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for and render probable the guilt of the defendant, but

they must exclude to a moral certainty every other reasonable theory but the single one of guilt, or the jury must find the defendant not guilty.

#### XIII.

That the Court erred, as a matter of law, in denying the defendant's motion for a new trial, to which ruling the exception of the defendant was duly taken and allowed.

JUD R. RUSH,
ALFRED F. MacDONALD,
Attorneys for Defendant.

And upon the foregoing Assignment of Errors and upon the record in said cause, the defendant prays that the verdict and [102] judgment rendered therein may be reversed.

Dated December 12, 1916.

JUD R. RUSH, ALFRED F. MacDONALD,

Attorneys for Defendant.

We hereby certify that the foregoing Assignment of Errors are made in behalf of the petitioner for a Writ of Error and are in our opinion well taken, and the same now constitute the Assignment of Errors upon the Writ prayed for.

JUD R. RUSH,
ALFRED F. MacDONALD,
Attorneys for Defendant.

[Endorsed]: Original. No. 1098. In the United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff, vs. James B. Simpson, Indicted as James B. Miller, Defendant. Assignment of Er-

rors. Received copy of within Assignment this 12th day of December, 1916. Clyde R. Moody, Asst. U. S. Atty., Attorney for Plaintiff. Filed Dec. 12, 1916. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy Jud R. Rush, Alfred F. MacDonald, Attorneys for Defendant. [103]

In the District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

# Order Allowing Writ of Error.

Upon motion of Jud R. Rush, Esq., and Alfred F. MacDonald, Esq., attorneys for the defendant, James B. Simpson, indicted as James B. Miller, and upon filing the petition for a writ of error and assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein; that pending the decision upon said writ of error the supersedeas prayed for by the defendant in his petition for writ of error herein is hereby allowed and the defendant, James B. Simpson, indicted as James B. Miller, be admitted to bail

upon said writ of error in the sum of \$2,500.

OSCAR A. TRIPPET.

Judge of the District Court.

Dated December 12, 1916.

[Endorsed]: Original. No. 1098—Criminal. In the United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff, vs. James B. Simpson, Indicted as James B. Miller, Defendant. Order Allowing Writ of Error. Received copy of within Order this—day of December, 1916. Filed Dec. 12, 1916, at 5 min. past 5 o'clock, P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. Jud R. Rush, Alfred F. MacDonald, Attorneys for Defendant. [104]

In the District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

Bond Pending Decision Upon Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, James B. Simpson, sometimes otherwise known as James B. Miller, of the county of Los Angeles, State of California, as principal, and Daisy D. Simpson, of the county of San Francisco, State of California, and Henrietta Simpson of the county of Marin, State of California, as sureties, are jointly and severally held and firmly bound unto the United States of America, in the full and just sum of twenty-five hundred (2,500) dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of November, in the year of our Lord, one thousand nine hundred and sixteen.

Whereas, lately at a term of the District Court of the United States, Southern District of California, Southern Division, in a suit pending in said court between the United States of America, plaintiff, and James B. Simpson, sometimes otherwise known as James B. Miller, defendant, a judgment and sentence was made, given and rendered against the said James B. Simpson, sometimes [105] otherwise known as James B. Miller, and the said James B. Simpson, sometimes otherwise known as James B. Miller, having obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a Citation directed to the said United States of America, citing and admonishing the United States of America, to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, pursuant to the terms and at the time fixed in said Citation, which said Citation has been duly served.

And whereas the said James B. Simpson, sometimes otherwise known as James B. Miller, has been admitted to bail, pending decision upon said Writ of Error, in the sum of twenty-five hundred (2,500) dollars.

Now, therefore, the condition of the above obligation is such, that if the said James B. Simpson, sometimes otherwise known as James B. Miller, shall appear, either in person or by his attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day, or days as may be appointed for the hearing of said cause in said court, and prosecute his Writ of Error, and, if the said James B. Simpson, sometimes otherwise known as James B. Miller, shall abide by and obey all orders made by the United States Circuit Court of Appeals, for the Ninth Circuit; and if the said James B. Simpson, sometimes otherwise known as James B. Miller, shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the re-trial by said District Court, if the judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and if the said James B. Simpson, sometimes otherwise known as James B. Miller, shall surrender himself in execution of the judgment and sentence aforesaid, if [106] the said judgment and sentence against him be affirmed by the said Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

JAMES B. MILLER,
JAMES B. SIMPSON, (Seal)
Principal.

MISS DAISY D. SIMPSON, HENRIETTA SIMPSON,

Sureties.

Signed, sealed and acknowledged by the principal December

above named before me this 13 day of November, 1916.

## THOMAS E. HAYDEN.

United States Commissioner in and for the Southern District of California.

Signed, sealed and acknowledged by the sureties

December

above named before me this 13th day of November, 1916.

THOMAS E. HAYDEN. (Seal)

United States Commissioner in and for the Northern District of California.

United States of America, Northern District of California, State of California, County of San Francisco,—ss.

Daisy D. Simpson, of the county of San Francisco, State of California, being duly sworn, says that she is worth the sum of twenty-five hundred dollars, over and above all *his* just debts and liabilities, exclusive of property exempt from execution, and that he is a resident within the State of California, and a freeholder therein.

#### MISS DAISY D. SIMPSON.

Subscribed and sworn to before me this 13 day of December

November, 1916.

[Seal]

THOMAS E. HAYDEN,

United States Commissioner in and for the Northern District of California. [107]

United States of America, Northern District of California, State of California, County of San Francisco,—ss.

Henrietta Simpson of the county of Marin, State of California, being duly sworn, says that she is worth the sum of twenty-five hundred dollars, over and above all her just debts and liabilities, exclusive of property exempt from execution, and that she is a resident within the State of California, and a free-holder therein.

#### HENRIETTA SIMPSON.

Subscribed and sworn to before me this 13 day of December

November, 1916.

THOMAS E. HAYDEN, (Seal)

United States Commissioner in and for the Northern District of California.

The foregoing bond is hereby approved by me this December

15 day of November, A. D. 1916.

TRIPPET,

Judge of the District Court of the United States, Southern District of California, Southern Division.

[Endorsed]: No. 1098—Crim. In the District Court of the United States, Southern District of California, Southern Division. United States of America, Plaintiff, vs. James B. Simpson, Indicted as James B. Miller, Defendant. Bond Pending Decision Upon Writ of Error. O. K.—C. R. Moody, Asst. U. S. Atty. Filed Dec. 15, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis & Rush & Alfred F. MacDonald, 600 Bryson Building, Los Angeles, California, Attorneys for Defendant. [108]

## UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

Clerk's Office.

No. 1098—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

# Praecipe (Amended).

To the Clerk of Said Court:

Sir: Please issue a certified transcript of the following matters and documents, or copies thereof, including endorsements, upon writ of error to the United States District Court for the Southern District of California, Southern Division, to wit.

- 1. Indictment.
- 2. Arraignment and Plea of Defendant.
- 3. Order of September 18, 1916, substituting attorneys and withdrawing plea of not guilty, and granting leave to defendant to file a demurrer to the Indictment.
  - 4. Demurrer.
  - 5. Order Overruling Demurrer.
  - 6. Minutes of Trial.
  - 7. Verdict (recorded).
  - 8. Verdict (filed).
- 9. Orders denying motions for new trial and in arrest of judgment and minutes and orders of proceedings had on December 4th, 1916.
  - 10. Sentence and Judgment of the Court.
  - 11. Petition for Writ of Error.
  - 12. Assignment of Errors.
  - 13. Order Allowing Writ of Error.
  - 14. Supersedeas Bond of Defendant.
  - 15. Writ of Error.
- 16. Citation to United States of America on Writ of Error.
- 17. Certificate of Clerk of U. S. District Court to Record. [109]

- 18. Bill of Exceptions.
- 19. Praecipe. (amended.)

# ALFRED F. MACDONALD, JUD R. RUSH,

Attorneys for Defendant.

[Endorsed]: No. 1098—Crim. U. S. District Court, Southern District Court of California, Southern Division. United States of America, Plaintiff, vs. James B. Simpson, Indicted as James B. Miller, Defendant. Amended Praecipe for a Certified Transcript of Certain Matters and Documents. Filed Feb. 2, 1917. Wm. M. Van Dyke, Clerk. Leslie S. Colyer, Deputy Clerk. [110]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 1098—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Defendant.

# Certificate of Clerk U. S. District Court to Transcript of Record.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and ten typewritten

pages, numbered from 1 to 110 inclusive and comprised in one volume, to be a full, true and correct copy of the Indictment, Arraignment and Plea of Defendant, Order Substituting Attorneys, Withdrawing Plea of Not Guilty, and Allowing Demurrer to Indictment, Demurrer to Indictment, Order Overruling Demurrer, Minutes of the Trial, Verdict, Minute Order December 4, 1916, Minute Order December 12, 1916, Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Bond of Defendant Pending Decision on Writ of Error, and Amended Praecipe to Clerk for Transcript, in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the plaintiff in error by his attorney of record.

I further certify that the cost of the foregoing transcript of record on Writ of Error is \$59.10, the amount whereof has been paid me by James B. Simpson, indicted as James B. Miller, the plaintiff in error herein. [111]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, on this 13th day of February, in the year of our Lord one thousand nine hundred and seventeen, and of our Independence the one hundred and forty-first.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [112] [Endorsed]: No. 2943. United States Circuit Court of Appeals for the Ninth Circuit. James B. Simpson, Indicted as James B. Miller, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division. Filed February 27, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES B. SIMPSON, Indicted as JAMES B. MILLER,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendants in Error.

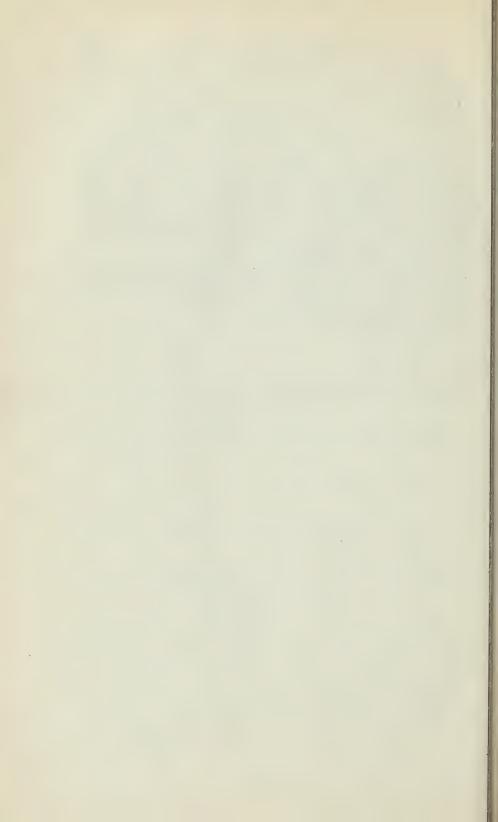
Order Extending Time to File Record and Docket Cause to March 2, 1917.

Good cause appearing therefor, it is hereby ordered that the time within which the plaintiff in error in the above-entitled cause may file the record and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including the 2d day of March, 1917.

Dated, Los Angeles, California, January 12th, 1917.

OSCAR A. TRIPPET, U. S. District Judge.

[Endorsed]: No. 2943. United States Circuit Court of Appeals for the Ninth Circuit. James B. Simpson, Indicted as James B. Miller, Plaintiff in Error, vs. The United States of America, Defendants in Error. Order Extending Time to File Record and Docket Cause to March 27, 1917. Filed Jan. 16, 1917. F. D. Monckton, Clerk. Refiled Feb. 27, 1917. F. D. Monckton, Clerk.



# **United States**

# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

James B. Simpson, Indicted as James B. Miller,

Plaintiff in Error,

Us.

The United States of America,

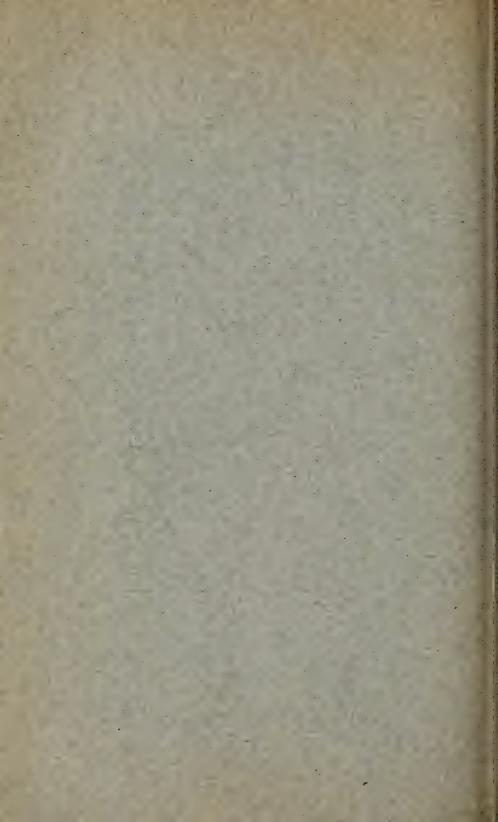
Defendant in Error.

### BRIEF OF PLAINTIFF IN ERROR.

ALFRED F. MACDONALD,
Jud R. Rush,
Attorneys for Plaintiff in Error.

APR 23 1917

F. D. Monckton, Clerk.



#### No. 2943.

# **United States**

# Circuit Court of Appeals,

#### FOR THE NINTH CIRCUIT.

James B. Simpson, Indicted as James B. Miller,

Plaintiff in Error,

US.

The United States of America,

Defendant in Error.

### BRIEF OF PLAINTIFF IN ERROR.

#### STATEMENT OF CASE.

This case reaches this court upon a writ of error to the United States District Court for the Southern District of California, Southern Division, Honorable Oscar A. Trippett, judge.

The defendant, whose true name is James B. Simpson, but who, since his boyhood has more generally been known among his friends and business associates as James B. Miller, was indicted for an alleged violation of section 3 of the "Mann White Slave Act."

The indictment contains two counts, upon the first of which the defendant was found "not guilty," and upon the second of which the jury returned a verdict of "guilty, with recommendation for leniency." Reference herein made to the "INDICTMENT" will therefor be intended to apply only to the second count therein contained.

The defendant interposed a demurrer to the indictment, wherein he objected to its sufficiency upon the grounds that it failed to state facts sufficient to constitute an offense, and upon the further ground that it was not direct or certain as respects the particular circumstances of the offense charged, and that said circumstances were necessary to be alleged in order to constitute a complete offense.

The second count of the indictment charges that the defendant, on or about the 26th day of November, 1915:

"Did knowingly, unlawfully and wilfully persuade, induce and entice a certain woman, to-wit, one Vida White, alias Vida Rogers, whose full and true name, other than as herein stated, is to the grand jurors unknown, to go from one place to another in foreign commerce, that is to say, to go from the city of San Francisco, state of California, to the town of Tia Juana, in the Republic of Mexico, via the Southern Pacific Company railroad, a common carrier, from the said city of San Francisco to the city of San Diego, California, and via automobile stage, a common carrier, from the city of San Diego, California, to the town of Tia Juana, Mexico, for a certain immoral purpose, to-wit, for the purpose of having said Vida White

alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse." [Tr. p. 7.]

The theory of the government as to how, or in what manner the defendant "persuaded, induced and enticed" Vida Rogers to go from San Francisco to Tia Juana was disclosed in the opening statement of the district attorney to the jury, wherein he stated that the defendant:

"Sent a telegram to Vida White, asking that she come down to Tia Juana and take charge of the house that he had built there, and that he would split fifty-fifty with her; and that subsequently to that he wired her again, urging her to come immediately and take charge of the house; and that she did go from the city of San Francisco to the city of Tia Juana, in Mexico." [Tr. p. 35.]

In support of this statement, and in order to prove the necessary persuasion, inducement and enticement of Vida Rogers by the defendant (without proof of which essential element there can, of course, be no violation of section 3 of the act) the Government interrogated its first witness, one Louise Bordeau, concerning the contents of two certain telegrams, testified to by her, as having been received in the month of November, 1915, by Vida Rogers (the woman alleged to have been persuaded, etc.,) in the city of San Francisco, and exhibited by said Vida Rogers to the witness, at and in a certain house of prostitution in that city which was conducted by said Vida Rogers and in which, at that time the witness, Louise Bordeau was

leading a life of prostitution. Over the objection of the defendant that such testimony was incompetent, irrelevant and immaterial; that no foundation had been laid for the question, and that the answers of the witness as to the contents of the alleged telegrams shown to her by Vida Rogers would not be the best evidence and that the questions concerning the contents of the alleged telegrams called for a conclusion of the witness and hearsay testimony, the witness was permitted by the court to testify what the alleged wording of the contents of the telegrams was as she remembered it.

The witness testified in reference to the first telegram as follows:

"Q. Now, will you kindly state the wording of the contents of the telegram as you remember it?

A. It was about a house with a dance-hall, kitchen and bar and five rooms in connection. Looks like a good proposition, Will finance everything. Will split fifty-fifty." [Tr. p. 42.]

And in reference to the second telegram as follows:

- "Q. Do you recall at this time what that telegram said?
  - A. Yes, sir.
- Q. What did that telegram say, as near as you can recall at this time?
- A. That everything ready. Leave Thursday or Friday, I believe it was.
  - Q. Do you remember by whom it was signed?
  - A. Jim." [Tr. p. 44.]

At the conclusion of the Government's case, upon motion of the defendant to strike all testimony concerning the contents of the telegrams from the record, which motion was predicated upon the same grounds as the defendant's objection thereto at the time it was received, the court made its order striking from the record the evidence objected to.

The defendant contended, on his motion for a new trial, and now most earnestly maintains, that the evidence, which it is conceded, was erroneously admitted, was so highly prejudicial in its character, that in view of all the other evidence in the case, it is clear that by reason of its admission the jury was lead to convict the defendant by reason of passion, prejudice and the ineffaceable recollection of the stricken testimony still in their minds, and not upon the legal evidence introduced at the trial of the cause.

At the conclusion of the Government's case, the defendant moved the court to instruct the jury to find a verdict of not guilty, on the ground that there was not sufficient evidence to sustain a conviction for the offense charged. The court denied the motion and in presenting the record to this court for review, plaintiff in error unhesitatingly and most positively asserts, absolutely fearless of naught but a dogmatic contradiction, that the closest, most careful and scrutinizing reading of the entire record will fail to reveal any evidence whatsoever to establish any one of the essential elements of the offense defined in the statute and attempted to be charged in the indictment.

We will discuss the evidence at length in our argument hereafter presented.

The court instructed the jury, and in so doing gave several instructions diametrically opposed to those requested by the defendant, and plaintiff in error will hereafter point out what we believe to be error of the trial court in this regard.

Following the return of the verdict of the jury motions were duly made for a new trial and in arrest of judgment, and denied and the defendant was sentenced by the judgment of the court to be imprisoned in the United States penitentiary at McNeil Island for a term of one year and one day and to pay a fine of one thousand dollars.

#### II.

# Brief Outline of Specification of Errors Relied Upon by Plaintiff in Error and Argument.

FIRST: ERROR OF THE COURT IN OVERRULING THE DEMURRER OF THE DEFENDANT TO THE INDICT-MENT.

- A. The indictment does not state facts sufficient to constitute a punishable offense.
- B. It is not direct or certain as respects the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.
- SECOND: ERROR OF THE COURT IN PERMITTING THE WITNESS LOUISE BORDEAU TO TESTIFY IN REFERENCE TO THE ALLEGED CONTENTS OF A TELEGRAM SHOWN TO HER BY VIDA ROGERS IN SAN FRANCISCO.
  - A. The evidence was erroneously admitted in the first instance.

- B. The subsequent action of the court did not cure the error.
  - It was highly prejudicial and the only fact, matter or circumstance in the whole trial tending to establish the gravaman of the offense.

THIRD: ERROR OF THE COURT IN THE ADMISSION.

OVER THE OBJECTION OF THE DEFENDANT, OF

UNITED STATES EXHIBITS 1, 3 AND 4.

- A. They were highly prejudicial.
- B. They violated elementary rules of evidence.

Fourth: Error of the Court in Denying Defendant's Motion for an Instructed Verdict.

- A. No evidence to establish:
  - That the defendant persuaded, induced or enticed Vida Rogers to go from San Francisco to Tia Juana.
  - That the defendant intended that Vida Rogers would or should engage in any unlawful practice whatsoever in Tia Juana.

FIFTH: ERROR OF THE COURT IN RENDERING JUDG-MENT AGAINST THE DEFENDANT.

- A. The evidence introduced at the trial was not sufficient to justify the verdict of the jury, or the judgment of the court.
- B. The evidence did not show or tend to show that the defendant had committed any offense set out or attempted to be set out in the indictment.

C. The evidence did not show, or tend to show, that the defendant did knowingly persuade, induce or entice Vida Rogers to go from one place to another in foreign commerce.

SIXTH: INSTRUCTIONS.

- A Error of Court in instructing the jury as to the portion hereinafter set forth.
- B. Error of court in refusing to instruct the jury as requested by defendant, and hereinafter complained of.

#### POINT ONE.

## The Court Erred in Overruling the Demurrer of the **De**fendant to the Indictment.

Section 3 of the "Mann Act," under which this indictment is brought, reads as follows:

"Sec. 3. (Inducing, etc., transportation of women for immoral purposes a felony—punishment.) That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be

carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court."

And the charging part of the second count of the indictment is as follows:

"That James B. Miller \* \* \* on or about the 26th day of November, 1915, \* \* \* did knowingly, unlawfully and wilfully persuade, induce and entice a certain woman, to-wit, one Vida White, alias Vida Rogers, \* \* \* to go from one place to another in foreign commerce, \* \* \* for a certain immoral purpose, to-wit, for the purpose of having said Vida White, alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse."

THE INDICTMENT FAILS TO CHARGE AN OFFENSE.

It will be noted that, to be unlawful, the persuasion, inducement or enticement mentioned in section 3, must be with the intent and purpose on the part of the person persuading, etc., that the woman shall engage in the practice of "prostitution," or "debauchery" or "any other immoral practice." So, in the indictment under discussion, if the Government had charged that the defendant had persuaded and induced Vida Rogers to go from San Francisco to Tia Juana for the purpose of

having her there engage in prostitution or debauchery, there could be no question as to its sufficiency.

But the indictment charges that the defendant's immoral purpose was, to-wit, "for the purpose of having said Vida White, alias Vida Rogers, manage a house of prostitution," and it therefore follows that if this was not an immoral practice within the meaning of that term as used in the statute, the indictment fails to charge an offense. In other words, the purpose and intent on the part of a person charged to have the woman engage in any practice, however immoral or reprehensible, would not be unlawful, unless those acts intended by the defendant to be practiced by the woman were such as to constitute an immoral practice within the meaning of that term as used in the statute.

As said in the late case of U. S. v. Welsh, 220 Fed. 764:

"It goes without saying that this statute should receive a construction which will make it efficient to accomplish its intended purpose, but it should not be so enlarged or extended by judicial interpretation as to take in transactions which, however reprehensible, cannot be reasonably regarded as within its aim and intent. The conduct of this defendant, which the verdict requires us to assume, in corrupting a school girl of 15, closely related to himself by blood and a member of his brother's family, was so treacherous and detestable as to class him with the meanest of criminals; but that gives no warrant for punishing him under the White Slave Traffic Act, unless his proven transgressions come fairly within its provisions."

Thus the court, in determining the sufficiency of the indictment is necessarily called upon to construe and define the meaning of the term "other immoral practice" as used in the statute. This term, being general, but preceded by special descriptive acts, must be limited to acts of the same sort or kind under the old rule of ejusdem generis. This rule is well settled.

In the California case of Ex parte Williams found in the 87 Pac. Rep., at page 565, the Appellate Court succinctly states the rule as follows:

"The rule seems to be well established in the interpretation of statutes and clauses like the one under consideration that where general words follow particular ones, the former are construed as applicable to persons or things of the same kind, class or nature. The rule has been further stated as follows: 'Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the class embraces "other" persons or things, the word "other" will generally be read as "other such like," so that the persons or things therein comprised may be read as of the same kind, class or nature, with and not of a quality superior to, or different from those specifically enumerated.' 21 Am. & Eng. Ency. 1012."

In the above case the court was called upon to determine the meaning of the words "other representative of value" as used in the phrase "money, checks, credits, or other representative of value." It held that the term "other representative of value" must under the rule of *ejusdem generis* be narrowed to conform to the meaning of the specific terms "money, checks or

credits" and therefore that the words would not apply to merchandise or anything else except the equivalent of money, checks or credits.

In several decisions of the United States court reference has been made to the meaning of the term "other immoral purpose" and "other immoral practice" and the proposition that that term must be limited to include only a like purpose as prostitution or debauchery.

In the case of U. S. v. Bitty, 208 U. S. 543, the Supreme Court of the United States in reference to the words "any other immoral purpose" as used in the phrase "for the purpose of prostitution or for any other immoral purpose" said the following:

"It may be admitted that, in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis's Sutherland, Stat. Constr. sec. 423, and authorities cited."

Also see case of

U. S. v. Flaspoller, 205 Fed. 1006.

From what has been said above it is readily seen, therefore, that the immoral purpose or immoral practice referred to by the words "other immoral purpose" and "other immoral practice" in the statute, must be a purpose or practice of the same general class or kind as the particular purpose or practice of prostitution and debauchery.

THE LANGUAGE OF THE STATUTE CONTEMPLATES PER-SONAL SEXUAL DEBAUCHERY.

In the case of Suslak v. United States, 213 Fed. 913, a decision rendered by the Circuit Court of Appeals of the Ninth Circuit, and therefore the law of this circuit, this court rendered an important decision for the reason, among others, that it defined the meaning of the terms "prostitution" and "debauchery." In reference to the term "prostitution" the court approved the instruction of the trial court given to the jury in reference thereto, the pertinent portion thereof being as follows:

"Prostitution, within the meaning of the law and the charge before you now, means that the woman is to offer her body to indiscriminate sexual intercourse with men, either for hire or without hire."

And in reference to the term "debauchery" this court approves the definition given in the Century Dictionary wherein it is defined as follows:

"Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust."

And this court says on page 917 that the term was intended to be used in the act in the sense of unlawful indulgence of lust.

A further definition of the word "debauchery" is found in the case of Gillette v. United States, 236 Fed. Rep. 215, decided by the Circuit Court of Appeals of the Eighth Circuit on September 4, 1916. Circuit Judge

Carland on page 218 of the report, uses the following language:

"The word 'debauchery' is a word of broad signification. It includes all kinds of excessive indulgence in sensual pleasures of any kind, such as gluttony and intemperance; but the word is used in the statute with reference to immoral sexual relations."

The terms "prostitution" and "debauchery" necessarily imply personal debauchery and indulgence of a sexual nature, and every reported case that we have read where the charge was under section 3 of the act shows that it was a debauchery of the body.

#### See:

U. S. v. Paulson, 199 Fed. 423;

U. S. v. Flaspoller, 205 Fed. 1006;

U. S. v. Wilson, 58 L. E. 728, 232 U. S. 728;

U. S. v. Hoke, 57 L. E. 523;

U. S. v. Brand, 229 Fed. 847;

U. S. v. Welsch, 220 Fed. 764;

U. S. v. Johnson, 215 Fed. 679.

The purpose charged in this indictment is not that Vida Rogers would engage in the practice of prostitution or debauchery, but that the defendant merely had an intent to have Vida Rogers "manage a house of prostitution." This she could do, and still not engage in either personal prostitution or personal debauchery. It is quite possible, and from an investigation of the police records of our larger cities quite probable, that in those places where prostitution is and has been legalized, many women have acted as the Madam of a

house, without they themselves engaging in the practice. Again, Vida Rogers might have been a woman 65 or 70 years old and still run a house of prostitution with never a thought of she, herself, selling her own body for filthy lucre.

We respectfully submit that while the indictment charges a purpose and intent most immoral and loath-some, it does not charge that the defendant had for his purpose an intent that Vida Rogers would personally engage in prostitution or debauchery within the meaning of that term as used in the statute, and defined in accordance with the rule of ejusdem generis.

True, in the Athanasaw case, 227 U. S. 326, the Supreme Court held that if the conditions shown to exist were such as would "necessarily and eventually lead to a life of debauchery or a carnal nature relating to sexual intercouse between man and woman" a conviction would be sustained under the statute, but it is noteworthy that in that case the prosecution alleged the transportation and persuasion, etc., was for the purpose of "debauchery,"—a term used in the statute, and that the defendant purposed that the girl should "give herself up to debauchery."

But as we have said before, if the Government had charged a purpose named in the statute the indictment would have been sufficient. And this brings us to the uncertainties existing in this indictment.

We contend that to effectively charge an immoral purpose in the indictment on the part of the defendant, under section 3 of the act, it is necessary to allege directly that the defendant intended that the woman

engage in the practice of prostitution or debauchery, or in the event this is not alleged, to set forth the facts and circumstances showing that, and allege that the woman would be placed in such surroundings, conditions and environments as would necessarily and eventually lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman.

The reason for this is twofold, first, so that the court may see if, in law, the alleged facts constitute an "immoral practice" within the purview of the statute, and second, so that the defendant may be informed as to what he is charged and thus prepare himself to meet that charge.

Is it alleged in this indictment that Vida Rogers would, or that the defendant intended that she would, be lead into a life of prostitution or debauchery?

Does it follow from an allegation that the purpose of the defendant was that Vida Rogers should manage a house of prostitution that he intended that she would prostitute her own body?

If she did manage a house of prostitution and did not herself engage in the practice of personal sexual prostitution or personal sexual debauchery, can it be said that under the term "other immoral practice," defined according to the rule of *ejusdem generis*, that conduct was an immoral purpose within the purview of the statute?

The California Penal Code provides in reference to the certainty required in reference to the charge of a public offense as follows: Sec. 950. "INDICTMENT OR INFORMATION, WHAT MUST CONTAIN. The indictment or information must contain:

- I. The title of the action, specifying the name of court to which the same is presented, and the names of the parties;
- 2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

Sec. 952. "Indictment must be direct and certain, as it regards:

- 1. The party charged;
- 2. The offense charged;
- 3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

The Supreme Court of the state of California in the case of People v. Eppinger, 105 Cal. 236, sets forth the degree of certainty required to meet an objection to sufficiency upon the ground that it is uncertain as follows:

"An indictment or information must contain matter which shows on its face that a crime has been committed by the accused. If the matters charged in the indictment or information are as consistent with the innocence of the accused as with his guilt the presumption of his innocence will overcome the accusation of his guilt and the accused is not to be subjected to a trial of the charge."

The above case is cited with approval in the case of People v. Earl, 19 App. 69.

In the case of People v. Robles, 117 Cal. 681, the court says:

"As matter of evidence, inferences and presumptions of fact might be drawn by a jury from all the circumstances—clearly indicating defendant's guilt,—and be justified. But we are dealing with the question as a matter of law; we are testing the sufficiency of the pleading in the light of law, and under such circumstances may not be aided by presumptions and inferences. The indictment must charge a crime in words; inferences cannot be invoked to aid its sufficiency."

"It is an elementary principle of criminal law that the indictment or information must state that a crime has been committed, either by direct and positive averment in the language of the statute, or its equivalent or by stating facts which show that such crime has been committed. In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged."

People v. Terrill, 127 Cal. 99.

## See also:

People v. Carrol, I Cal. App. 2.

"In no case can an indictment be aided by presumption."

People v. Cleary, 1 Cal. App. 52.

Both the Carrol case and the Terrill case are cited with approval in People v. Allison, 25 Cal. App. 746.

The Supreme Court of the United States has enunciated and approved the same proposition:

"It is an elementary principle of criminal plead-

ing that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars. The object of the indictment is: First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

United States v. Cruikshank, 92 U. S. 542.

## See also:

U. S. v. Simmons, 96 U. S. 360;

U. S. v. Carll, 105 U. S. 611;

U. S. v. Moore, 160 U. S. 40;

U. S. v. Hess, 124 U. S. 486;

U. S. v. McConaughy, 33 Fed. 168.

In conclusion on this point we again submit, first, that the indictment in this case fails to state facts sufficient to effectively charge a violation of section 3 for the reason that it does not charge that the defendant's purpose was to have Vida Rogers engage in the practice of prostitution or debauchery, and the purpose that is charged is not an immoral purpose within the meaning of the words "other immoral purpose" as construed and defined by the adjudicated cases, and second, that it fails to measure up to the rules and

doctrines laid down by every court in our land as a test for the sufficiency of the allegations attempted to be charged for the reason that it is not brought within the rule laid down in the Athanasaw case, which would require that it be alleged that the purpose was for debauchery and that the conditions were such that Vida Rogers would have been necessarily and naturally lead into a life of debauchery of a carnal nature relating to sexual intercourse between man and woman.

## POINT TWO.

The Court Erred in Overruling the Objections of the Defendant to the Questions Propounded to the Witness, Louise Bordeau, in Reference to the Contents of Two Telegrams Shown to her in San Francisco by Vida Rogers, and Permitting the Witness to State from her Memory the Wording of the Alleged Contents of the Telegrams.

The evidence erroneously admitted is here set forth in full [Tr. pp. 36-44]:

"Vida Rogers received two telegrams about the time she and I left San Francisco.

Q. I will exhibit to you a telegram, which I will call United States Exhibit I for identification, and I will ask you if that is the wording of the telegram that you say that this woman received?

Mr. Rush: Just a moment. I object to that question as incompetent, irrelevant and immaterial.

The Court: I think the "wording," Mr. Moody—if that is the telegram—

Mr. Moody: Your Honor, it is impossible to produce the typewritten telegram which is delivered to a woman, but the telegram which is filed, and which can subsequently be proven to have been filed,—if this woman can testify that that is the same wording that she saw at that time, then it would be a sufficient connection of the telegram.

The Court: If you want to introduce a copy, you will have to show that you cannot produce the original.

Mr. Moody: This is the original; this is not a copy. This is the one which was filed for record, and which was sent, which was filed in San Diego. This is not a copy.

Mr. Rush: I want to add to my objection the further ground that it calls for hearsay.

The Court: Now, do you propose to prove that you cannot get the copy, or the original, whichever it may be designated?

Mr. Moody: I propose to show that the woman, Vida Rogers, is without the jurisdiction of this court.

The Court: And that she has got that telegram?

Mr. Moody: That is impossible for us to say. The last time we had any information about it, she had it. But she is now without the jurisdiction of the court, and the process of this court will not reach her.

The Court: You are going to prove that? Mr. Moody: I will prove that by this witness.

The Court: I think you better prove that first, Mr. Moody.

Mr. Moody: Q. Do you know where Vida Rogers is at the present time?

A. I believe she in Tia Juana.

Q. When did you see her in Tia Juana last?

A. It was about in July, was the last time I was over there.

Q. And she was there at that time?

A. She was there at that time.

Q. Have you seen her since?

Mr. Rush: When was that?

Mr. Moody: In July of this year.

The Court: Q. July of this year you are speaking about?

A. Yes.

Mr. Moody: Q. Have you seen her since?

A. No, I have not.

Q. Have you seen her in the United States since last November?

A. Oh, yes, sir.

Q. When was the last time you saw her in the United States?

A. Well, it was some time right after the floods: I don't remember just when.

Q. The last January floods?

A. Yes.

Q. And since that time you have not seen her in the United States?

A. No.

Mr. Moody: Now, if the court desires at this time any further evidence on the whereabouts of the woman, Vida Rogers, I can produce such testimony and withdraw this witness.

The Court: Well, I will not require you to withdraw her. Upon your representation that you expect to do it, I will permit the evidence, and I will strike it out if you fail to produce the evidence.

Mr. Rush: Your Honor, before Your Honor rules will you permit me to just suggest one matter, and that is this: I do it because I don't think

Your Honor apprehends the point of my objection. Before it can be shown that a telegram was received in San Francisco by this woman, or by anyone, it must be shown a telegram was sent, and before it can be proven that the telegram was sent, it must be proven it was sent by this defendant. So to show this woman a writing, or what purports to be a copy—not the thing that she saw there, but something containing the same language that she saw there— and ask her to refresh her memory from that, and say that that is the same language that was in the telegram that she saw in San Francisco, in any event would not be competent. She can only refresh her recollection from memoranda that she made herself. She cannot refresh her recollection from memoranda made by someone else, and which she. herself, did not see made, and never saw before this time. This, at the most, would be simply a memorandum of what the operator in the town from which it was sent, sent, and is not the identical object that she saw.

The Court: Isn't that so, Mr. Moody, that she can only refresh her memory and testify—she has either got to testify from memory, or from memoranda which she made herself?

Mr. Moody: The reason why I didn't ask her was because I did not desire that this woman should testify what was in the telegram that she saw in San Francisco—which she can testify from memory after it is shown that the telegram, or the party in whose custody it was, is now without the jurisdiction of the court—until after this telegram had been introduced in evidence; and I was only attempting at this time to present this telegram in the record for the purpose of identification

by this witness. If the court desires, I can ask her what was in that telegram.

The Court: I think you better proceed that way, from her own memory.

Mr. Moody: Q. You say this woman received a telegram in San Francisco just prior to the time that you and she left there; is that right?

A. Yes, sir.

Q. Do you remember about what date it was that she received the telegram?

A. No, sir, I couldn't tell you that, the day.

Q. Well, about how long was it before the day after Thanksgiving, the day upon which you said you left?

A. It must have been—oh, close onto three weeks.

Q. About three weeks before you left that she received this telegram?

A. Yes, sir.

Q. Do you recall at this time—do you recall whether or not Vida Rogers showed you the telegram and whether you read the telegram that she received, the first one?

A. Yes, sir.

Q. And do you recall at this time the substance of that telegram?

A. Well, perhaps not word for word.

Q. But do you recall the substance of it?

A Yes, sir.

O. What was the substance of it?

Mr. Rush: We object to that as incompetent, irrelevant and immaterial, and no proper foundation laid, and hearsay.

The Court: Well, on the promise of the United States attorney that they will show that the recip-

ient of the telegram is not in the jurisdiction of the court, the objection will be overruled.

By the Court: Q. Now, did this woman keep the telegram after you saw it? Was it in her possession the last time you saw it?

A. Yes, Your Honor.

Q. Well, answer the question.

Mr. Rush: We except to the ruling of the court. I understand—the court will pardon me if I inquire, in this court do we have to enter an exception to the ruling if we desire it, or does the rule that applies in the state court apply here now?

The Court: I do not think the rules apply, of the state court.

Mr. Rush: So that any time that we desire an exception to a ruling, we must enter our exception?

The Court: You can have a stipulation on that subject, if you desire it, to have an exception entered.

Mr. Rush: Will you stipulate that any time we object, we need not enter an exception, but that the exception may be presumed to have been preserved and entered, without going through the necessity in each instance?

Mr. Moody: I will so stipulate—in order to expedite the case—I will stipulate an exception may be deemed taken to all rulings.

Q. Now, will you kindly state the wording of the contents of the telegram as you remember it?

A. It was about a house with a dance-hall, kitchen and bar and five rooms in connection. Looks like a good proposition. Will finance everything. Will split fifty-fifty.

Q. Who signed the telegram, if you know; or whose name was signed to the telegram, if you know?

A. Just "Jim."

Q. Do you know anyone who is called Jim?

A. Mr. Miller, Jim Miller.

Mr. Rush: We object to that as incompetent, irrelevant and immaterial. Doubtless a great many men are called Jim.

The Court: I think that is too general, Mr. Moody. The answer will be stricken out.

- Q. Before you went to Tia Juana, did Vida Rogers receive any other telegram, if you know?
  - A. She received one other.
  - Q. About how long after the first one came?
- A. It must have been two weeks after the first one came.
- Q. And how long before she left San Francisco?
  - A. Just a very few days.
  - Q. Did you see that telegram?
  - A. Yes, sir.
  - Q. Did you read it?
  - A. Yes, sir.
- Q. Do you recall at this time what that telegram said?
  - A. Yes, sir.
  - Q. What did it say?

Mr. Rush: We object to that on the ground it is incompetent, irrelevant and immaterial, no proper foundation laid, not the best evidence, and calls for hearsay.

The Court: Q. Was this the last time you saw it, in the possession of this woman, Vida Rogers?

A. Yes, sir.

The Court: And you expect to show that you cannot produce the telegram, in the manner you have heretofore stated concerning the other telegram?

Mr. Moody: In the same manner, Your Honor. The Court: The objection will be overruled.

Mr. Moody: Q. What did that telegram say, as near as you can recall at this time?

A. That everything ready. Leave Thursday or Friday, I believe it was.

Q. Do you remember by whom it was signed? A. "Jim."

I don't think I remember this telegram as well as I do the other one; I did not see it as well. She showed me the telegram, though, but the first one, I saw it three or four different times. Vida Rogers had the second telegram after I saw it. I didn't see it more than once, that being the time I looked at it."

At the conclusion of the Government's case, on motion of the defendant, the above evidence was stricken from the record. [Tr. p. 73; Orig. Rec. p. 69.] The proceedings had at that time are here set forth in full:

"The Court: Well, now, over the objection of the defendant, a witness was permitted to testify to the contents of a telegram in the hands of Vida White in San Francisco. What do you desire to do with that for the defendant? It was admitted on certain representations made by the United States attorney, which undoubtedly were made in good faith.

Mr. Rush: We move that that testimony of the witness Louise Bordeau, concerning and referring to a telegram, which she said she saw in the hands of Vida White, or Vida Rogers, in San Francisco—that all such testimony be stricken out, on the grounds stated in the objection at the time the objection was interposed to such testimony; and on the further ground that the proper foundation

has not since been laid for the introduction of that testimony, and it has not been connected up with the defendant.

The Court: I will strike the evidence out concerning the contents of the telegram, as testified to by the witness; and I instruct you, gentlemen of the jury, that you shall consider this case without considering that testimony, and shall not consider any testimony that has been stricken out."

We do not believe it necessary to point out at length to this court wherein the admission of the evidence above set forth was erroneous.

The trial court, as shown above, admitted the testimony upon the promise and representation of the United States attorney that he would show that the recipient of the telegrams was not in the jurisdiction of the court. [Tr. p. 39; Orig. Rec. p. 41; Tr. p. 41; Orig. Rec. p. 42.]

No proof of this alleged fact was made, and again did a man's liberty hang in the balance by the slender thread of a promise unfulfilled and unkept. We cannot refrain from making critical comment on the practice which, at times, creeps into the trial of criminal cases that is best illustrated by the procedure followed in the admission of the above testimony in this case.

The testimony sought to be elicited from the witness went to the very essence and foundation of the Government's case. It was the one and only particle of evidence in the entire record from which it was possible for the jury to draw an inference that the defendant persuaded or induced Vida Rogers to go from San Francisco to Tia Juana. It therefore seems to us that

in all fairness to a defendant, who under our law can only be lawfully convicted by legal evidence convincing the jury beyond all reasonable doubt, courts should not permit testimony to be admitted over his objection, unless proper foundations are first made for its admission, or that when a prosecutor does make an unqualified promise to afterwards produce in evidence that which the court holds necessary to make the evidence competent, he should be held to strict accountability for his failure so to do. And in cases where, as here, the evidence admitted is the very gist of the case against the defendant, the latter should not be made to suffer at the hands of a prosecutor, who in his ardor and zeal to obtain a conviction makes an unqualified statement and promise, which he ought to have known, or at least should be held to have known, was impossible for him to fulfill.

Even had the Government proved that Vida Rogers was beyond the jurisdiction of the court, as an elementary matter of law, the evidence would still have been incompetent. Counsel for the defendant, in his objection to the testimony, as found on page 39 of the transcript of record, did his best to elucidate the true rule in reference to the admission of the testimony complained of, when he stated that "before it can be shown that a telegram was received in San Francisco by this woman, or by anyone, it must be shown that a telegram was sent, and before it can be proven that the telegram was sent, it must be proven that it was sent by this defendant."

Every authority in the United States that we have been able to find, supports this contention, and they are undivided in laying down the rule that before a telegram is admissible, in a criminal case, against the defendant, it must be shown that the defendant either sent it himself or authorized some one else to send it for him.

Of the textbooks on the subject, Jones in his work on Telegraph and Telephone Companies probably covers the ground more comprehensively than any other writer. In the second edition of his work, published in 1916, the author has devoted an entire chapter to telegraph communications as evidence and discusses at length what is the best evidence of the contents of a telegram, and what foundation is necessary to be laid before the admission in evidence of the contents of a telegram is proper. All of the authorities are collated in this late work and if this court is in any doubt as to what is the best evidence of the contents of a telegram, etc., we refer it to that textbook and the cases therein cited.

We here cite a few authorities upon the rule:

"In order to admit a telegram in evidence against the sender, it must first be proved that he is the author of the telegram, and the same proof may be resorted to in this instance as that adopted for the proof of the authorship of letters."

Jones on Tel. & Tel., Sec. 684.

"The authorship of a telegram must be proved before it can be admitted in evidence," etc. *Idem*.

In the case of Chester v. State, 23 Tex. App. 577, the state was allowed to prove by one Scott the contents of a telegram sent by witness at the instance and

request of defendant, to G. M. Salinger and Bro., Leavenworth, Kansas, and, in connection with this evidence, to read a dispatch purporting to be a reply thereto from G. M. Salinger. This testimony was objected to and the court held that oral testimony is not competent to prove the contents of telegrams sent by or at the instance of an accused until the failure to produce the better evidence is satisfactorily accounted for.

"So also, when the message is offered as a declaration by the sender in a criminal proceeding, or as an admission in a civil action the message as tendered to the company for transmission is the original and best proof."

Jones on Tel. & Tel., Sec. 694, and cases cited.

"A telegram was not admissible in evidence where there was no evidence to prove that it came from the telegraph office or who wrote it or signed it or where, when, or from whom it came, except as appeared upon the paper itself."

Syllabus, Reynolds v. Hinrichs, 94 N. W. 694.

We have cited the above cases and authority for the purpose of showing the grave injustice that was done to the defendant by the admission of the above testimony. There can be no doubt that the action of the court in permitting Louise Bordeau to state to the jury what her recollection was of the contents of the purported telegram she testified was received by Vida Rogers was error. Especially damaging did this testimony become to the defendant when it further appeared in the evidence, not by the direct testimony of witnesses, but by their conclusion and opinion formed

from an examination of a document in the files of the Western Union office at San Diego that at or about the time the witness testified Vida Rogers showed her a telegram in San Francisco, somebody had telephoned a message to a clerk of the Western Union, one Hartley Shaw; that he had reduced the message to writing and as far as they knew had sent the message to San Francisco. There is absolutely no evidence in any way connecting the defendant with the telephone message to Hartley Shaw, nor does it appear that Hartley Shaw reduced to writing, correctly, what was told to him over the telephone, nor was the person who received the purported message over the wire from San Diego present to testify as to what was actually received.

The alleged message, so Louise Bordeau testified, was shown to her by Vida Rogers in the month of November, 1915. The trial of the cause was held in the month of November, 1916, one year after she had seen the alleged message. If such testimony were admissible as competent evidence, certainly the rights of a defendant, in the trial of a criminal case, who is guaranteed the right by the Constitution to be confronted with the witnesses against him and the rules of law in reference to the best evidence and the exclusion of hearsay testimony would be violated to the extent which even the direct necessities of justice should not excuse or tolerate.

THE ACTION OF THE COURT IN STRIKING THE EVI-DENCE FROM THE RECORD DID NOT CURE THE ERROR IN ITS ADMISSION.

In discussing the effect of the erroneous admission of the above testimony, we approach the subject well knowing the general rule that ordinarily where evidence is erroneously admitted, and subsequently stricken out by the court, and the jury admonished not to consider it, that the error is cured.

This rule is the one applied in ordinary cases. Yet in each of the cases expressions will be found which militate against this view in exceptional cases.

It cannot be disputed that this is one of the exceptional cases. The district attorney, in his opening statement, told the jury that the Government expected to prove that the defendant sent a telegram to Vida Rogers asking her to come down and take charge of a house of prostitution and that subsequently that he wired her again urging her to come immediately and take charge of the house. As we have said before, without proof of persuasion, inducement, or enticement on the part of the defendant the case against him must fail. The testimony of Louise Bordeau was the only evidence whatsoever offered by the Government and received in evidence that showed or tended in the slightest degree to show the necessary persuasion or inducement. This being so, it is clear that the defendant was convicted, not upon the legal evidence introduced at the trial of the cause, but for the sole reason that the testimony of the witness was stamped so indelibly upon the minds of the jurors that they were unable in considering the case to efface from their memory the recollection of that testimony.

The highest tribunals of our various United States have frequently been called upon to express their opinion of the effect of motions striking evidence from the record, and the admonitions of the court to disregard the same, upon the action of jurors, where the evidence admitted was prejudicial.

We cite a few authorities from various states to show how the appellate courts have protected a defendant in a criminal action from a conviction had, where evidence was erroneously admitted to the prejudice of the accused, and with what language they have condemned the practice of permitting highly prejudicial testimony to go before the jury, upon the promise of the prosecuting officer to later produce evidence showing its competency.

"While, at the instance of defendant, the court instructed the jury that the evidence as to defendant's arrest in the state of Texas raised no presumption as to his guilt, and that they should disregard it in making up their verdict, we are far from believing that said instruction cured the error. It has been frequently ruled by this court that an instruction to disregard evidence improperly admitted in a criminal case will not cure the error of admitting it, if it was of a character prejudicial to the defendant. State v. Mix, 15 Mo. 153; State v. Hopper, 71 Mo. 425; State v. Fredericks, 85 Mo. 145; State v. Kuehner, 93 Mo. 193, 6 S. W. 118; State v. Thomas, 99 Mo. 235, 12 S. W. 643; State v. Spivey, 191 Mo. 87, 90 S. W. 81; State v. Minor, 193 Mo. 597, 92 S. W. 466. As said in the Minor case, supra, 'the greatest care should be taken by court and counsel to prevent the introduction of illegal evidence, since, when it is once lodged in the minds of the jury, no one can tell its effect."

State v. Martin, 129 S. W. 881, at page 887.

"Over the objection and exception of appellant and upon the promise of the county attorney to connect appellant therewith, the state was permitted to prove that large quantities of whiskey were delivered to persons by the names of J. Johnson, R. Jones and C. Conner. When the testimony was all introduced, counsel for appellant made a motion to exclude the same upon the ground that appellant had not been connected therewith. Whereupon the court instructed the jury as follows: 'Gentlemen, as to the evidence of the witnesses Crews. Ramsey and White, all of Crews' and Ramsev's and that portion of Wilmouth's evidence wherein he testified with reference to the receipt and delivery of whiskey and beer to C. Conner, R. Jones and J. Johnson, should be excluded, and you will not consider the same. You are also instructed that that portion of his evidence in regard to testifying to hauling five or six barrels that was taken from him and Mr. Edwards marked C. Conner, you must not consider that evidence. Also, as to the evidence of the witness Ramsey, as to the names that were on the barrels that the officers took from Edwards and Crews, and that portion of Mr. Wilmouth's testimony where he testified as to certain shipments being received at the Frisco Railroad Company's office here addressed to J. Johnson, C. Conner and R. Iones as the state had introduced no proof to connect the defendant with these shipments.'

"This court has frequently condemned the practice of permitting the introduction of testimony without first connecting the defendant therewith, and we desire now to repeat what we said on this subject in the case of Thompson v. State, 6 Okla. Cr. 50, 117 Pac. 216, as follows: 'It is true that

at the time that this evidence was introduced the state had not offered any evidence of a conspiracy between appellant and his co-defendant, Tom Gillstrap, to kill the deceased, and the evidence was admitted upon the promise of the state to connect this testimony with the defendant. We think that this is a dangerous practice, and should not be encouraged. If the state is permitted to get incompetent evidence before a jury upon the promise of a prosecuting attorney to connect it with the defendant, and he fails to do so, impressions may be made upon the jury which it would be difficult, if not impossible, to destroy by instructions from the court that they should not consider such testimony.' In the case of Sturgis v. State, 2 Okla. Cr. 385 (102 Pac. 66), this court said: 'In the case of Devore v. Territory of Oklahoma, 2 Okla. 565, 37 Pac. 1002, it was held that such evidence might be introduced before there was any evidence of such acting together by the defendant and the persons whose acts and statements were so admitted in evidence, upon the promise of the county attorney that such acting together will subsequently be shown.' To prevent what we conceive to be questionable practice in the future, we would advise the trial courts against pursuing this course. The safe rule is to require some evidence of such acting together before the acts and declarations of others concerned in the commission of an offense are admitted in evidence, when such acts were not committed or statements were not made in the presence of the defendant. If it is made to appear to this court that incompetent and damaging testimony has been introduced against a defendant upon a promise of a prosecuting attorney to subsequently connect this testimony with the defendant,

and this connection is not made, we would fee! strongly inclined to reverse a conviction upon the ground that the jury may have been influenced by such improper testimony, notwithstanding the instruction of the court that they should not consider it. We know that promises to connect testimony are often made in good faith when through overzeal counsel may be mistaken as to the effect of the testimony by which they expect to make this connection. Upon the other hand, it gives attorneys who are indifferent as to the means by which they get a verdict an opportunity to inflict irreparable injury upon their opponents. If trial courts will persist in allowing testimony to be prematurely introduced upon the ground that the competency of such testimony will be made to appear, they do so at their peril. If the competency of the testimony is subsequently made to appear, the error will be immaterial and harmless; but, if this is not done and the testimony is material and damaging to a defendant, we doubt if any instructions by a trial court could do away with the injury which has been done to a defendant by such testimony, and a new trial should be granted."

Tucker v. State, 132 Pac. 689, at page 690.

"The state introduced evidence regarding the theft of another horse. Upon objection by defendant, it was proposed by the district attorney to connect the same. But this was not done. The evidence was afterwards stricken out. The bill shows that in the trial of another case, the district attorney as well as the court became familiar with the facts connected with said horse, and knew that the state would not be able to connect

appellant with theft of this other horse. As presented, we think this testimony should not have been admitted, and under the circumstance the error was not entirely cured by withdrawing said testimony."

Tijerina v. State, 74 S. W. 913.

"In cases where improper prejudicial evidence has been permitted to go to the jury upon a wrong theory, or under a mistake of the court as to the law, \* \* \* and the evidence thus introduced is of a character to prejudice the jurors against the defendant, and to make a fixed impression upon the mind, and it is not reasonably probable that the verdict would have been the same had this illegal evidence not been introduced, we think a new trial should be granted. See, also, Barth v. State, 39 Tex. Cr. R. 381, 46 S. W. 228, 73 Am. St. Rep. 935; Bullock v. State, 65 N. J. Law 557, 47 Atl. 62, 86 Am. St. Rep. 668; State v. Finch, 71 Kan. 793, 81 Pac. 494; Dysart v. State, 46 Tex. Cr. R. 52, 79 S. W. 534; People v. Rodriguez, 134 Cal. 140, 66 Pac. 174; Davis v. State, 85 Miss. 416, 37 South. 1018; State v. Bateman, 198 Mo. 212, 94 S. W. 843; State v. De Masters, 15 S. D. 581, 90 N. W. 852."

State v. Rees, 107 Pac. 893.

The above case cites with approval the case of Drury v. Territory, 60 Pac. 101, in which case in a well considered opinion the Supreme Court of Oklahoma discusses at length the points above referred to.

"It is insisted that the foregoing error of the court was cured when the witness Hilton took the stand and gave to the jury substantially the same statements and confessions he had prior to that

time made to the officers. We cannot say that the jury attached no importance to these statements of Hilton made shortly after the commission of the crime, not that the verdict would have been the same if they had been rejected by the court. It is further insisted that the error of the court was cured by the following instruction given to the jury: 'I charge you that no statements, or admissions, or confessions (other than his own sworn testimony in court), made by the alleged accomplice. Hilton, after the commission of the offense charged, and not in the presence of the defendant, should be considered by you as evidence in this case against this defendant, as tending to connect him with the offense.' Judges are not justified by the law in admitting evidence before the jury under objection and exception, and then, after the case has been argued by counsel, instruct the jury that such evidence should not be considered by them in making up their verdict. Such a course, if practiced, certainly would be out of the ordinary, and not just to a defendant."

People v. Oldham, 111 Cal. 648, page 653.

"There are cases where an erroneous ruling of the court in admitting evidence cannot be cured by a subsequent reversal by the court of its own actions. In those cases the incompetent matters have gone to the jury, and the injury is beyond repair. Instructions of the judge to disregard such evidence are in such cases no adequate remedy for the wrong done."

People v. Wong Chuey, 117 Cal. 624, page 631.

"Where a defendant, accused of crime, testified only as to his present residence, out of the county of the venue, he cannot properly be cross-examined as to his residence in the county at a time long prior to the date of the offense charged; and his answers to collateral and irrelevant questions about such prior residence are conclusive, and cannot be contradicted for the purpose of impeachment. The admission of the testimony of the sheriff in contradiction of the defendant, that he was at such prior date in the county, at the county jail, was prejudicially erroneous, and the error was not cured by striking out the allusion to the county jail." (Syllabus.)

People v. Rodriguez, 134 Cal. 140.

"The rulings of the court in allowing the district attorney to make such statements and charges against the defendant in the form of questions were clearly erroneous and tendered to injure the defendant seriously. The final ruling of the court was right, and such reversal of the former rulings was made as clear and comprehensive as it was possible to make it. As a matter of law the statements and charges were not longer a part of the record. The previous erroneous rulings were theoretically cured, and the statements and charges eliminated from the minds of the jury. Whether in practical result it is possible to remove from the minds of jurymen the effect of such detailed statements and charges when so deliberately received and repeated in their hearing may well be doubted. If the dramatic recounting of the alleged acts and sayings of the defendant was calculated to effect the jury in determining the guilt or innocence of the defendant notwithstanding that they were at least in form removed from its consideration, we have the power and it is our duty to give the defendant a new trial for that reason."

People v. Conrow, 93 N. E. 943, page 948.

In our investigations of the authorities holding that the erroneous admission of prejudicial evidence over the objection of the defendant is not cured except in ordinary cases by the subsequent action of the court in striking the same from the record and admonishing the jury not to consider same in their deliberations on the verdict, we have not been able to find a case where the record showed that the substantial rights of the defendant had been prejudiced that the court did not unhesitatingly set the verdict aside.

Many, many more authorities on this proposition could be cited from the various appellate courts throughout the country to the same effect, but inasmuch as the rule of law seems to be well established we will content ourselves with citing but one more case. This case was decided by the Circuit Court of Appeals of the Fifth Circuit on October 4th, 1915, and seems to be the latest decision of any of the United States courts that bears upon the subject at hand. It is the case of Latham v. United States, 226 Fed. Rep. 420. The defendant was convicted for devising a fraudulent scheme for obtaining money, etc., by means of the postoffice. In argument the defendant's counsel commented upon the fact that only one witness had been produced to show that any money had been received, etc., a proper comment (as the court says) on his part. The district attorney in closing the case for the Government, made the statement that, had the train not been

three hours late he would have had another witness, who would have testified that he also had been defrauded. The defendant's counsel immediately objected, and the objection was sustained by the court and the jury properly cautioned not to consider said statement of counsel.

The court in discussing the remarks of the district attorney uses the following language, which we respectfully submit, in view of the circumstances in the case at bar and the fact that the objectionable testimony was the only evidence offered which tended to show any persuasion on the part of defendant, applies with great force to our contention:

"The almost unbroken line of authorities hold that it is to the action of the court upon the objection to which error may be assigned; that, if the court stops counsel and cautions the jury this cures the violation of the defendant's right to a trial and verdict on the testimony of witnesses, and not statements of counsel not based on testimony. And in ordinary cases this is the correct rule. Yet in each of the cases expressions will be found which militate against this view in exceptional cases.

"Every one must realize that there are exceptional cases where, although the court does stop counsel and does caution the jury, the impression has been made by the remarks of counsel, and although the jury honestly try to ignore that impression, it still enters into and forms a part of the verdict. In such cases the trial court should set aside the verdict on motion for a new trial. The language of Justice Fowler, in Tucker v. Henniker, 41 N. H. 325, is pertinent, and applies with great force to criminal prosecutions:

"Yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. \* \* \* It is unreasonable to believe the jury will utterly disregard them. They may struggle to disregard them. They may think they have done so, and still be led involuntarily to shape their verdict under their influence. \* \* \*

"\* \* While the fact that anyone was actually defrauded may not have been material, yet the fact that people may have been defrauded by the scheme would, necessarily, have had great weight with a jury in arriving at their conclusion that a scheme had been formed with intent to defraud. It seems to me impossible to say that the remarks of the district attorney were not prejudicial to the defendant's right to a verdict on the testimony of witnesses."

In the case at bar the testimony of Louise Bordeau of what her recollection was of the wording of the contents of the telegram to the effect that it was "about a house with a dance hall, kitchen and bar and five rooms in connection. Looks like a good proposition. Will finance everything. Will split fifty-fifty," and "That everything ready. Leave Thursday or Friday," and both telegrams signed by "Jim," would certainly be very much more prejudicial to the rights of the defendant and particularly the right to have introduced against him the best evidence, than the statement of the district attorney in the case above quoted.

We submit in conclusion that the action of the court in instructing the jury in this case to disregard the prejudicial and damaging testimony of Louise Bordeau did not in fact cure the error of the court in permitting her to testify. The injury was too deeply fixed in the minds of the jurors to be eradicated, and as said in the case of Drury v. Territory, 60 Pac. 101:

"In cases where improper prejudicial evidence has been permitted to go to the jury upon a wrong theory, or under a mistake of the court as to the law, or upon the contention by the prosecution that it will later be made competent by proof of other facts, which are not proven, and the evidence thus introduced is of a character to prejudice the jurors against the defendant, and to make a fixed impression on the minds, and it is not reasonably probable that the verdict would have been the same had this illegal evidence not been introduced,"

a judgment of conviction should not be sustained and that this court in all fairness to this defendant should unhesitatingly set aside the verdict.

#### POINT THREE,

# The Court Erred in Overruling the Objections of the Defendant to the Admission of U. S. Exhibits III and IV.

The plaintiff in error did not assign the above point as an error in his assignment of errors, but inasmuch as the documents admitted relate to certain telegrams alleged to have been sent by the defendant, the matter becomes exceedingly important when considered with the admission of the testimony of Louise Bordeau in reference to the contents of the telegrams received by Vida Rogers, and we therefore respectfully request this Honorable Court to review the matter here complained of, under the rule of this court that it may, at its option, notice a plain error not assigned.

The witness F. A. Bennett, manager of the Western Union Telegraph Company in San Diego, after testifying that the defendant had opened a charge account with the company on May 24, 1915 [see U. S. Exhibit No. 1 and Tr. pp. 53-54], was shown a purported telegram [Tr. p. 55] which he testified had been telephoned in to the office in San Diego by somebody to be sent [Tr. p. 55] and that the telephone message had been received by an employee of the company, one Hartley Shaw, who was the person that wrote out what was in the record of the receipt of the telegram. [Tr. p. 62.]

The purported telegram was marked U. S. Exhibit No. 2 for Identification, and the witness was then shown a bill which he testified was a copy of a bill rendered the defendant for the month of November, 1915. This bill was marked U. S. Exhibit No. 3 for Identification. Another document, testified to by the witness as being a "daily cash record," was marked U. S. Exhibit No. 4 for Identification. The witness then testified that the documents marked for identification were regular routine records of the Western Union office in San Diego, but that he did not make up the records himself and that "all I know about it is simply what I find in the records. Personally I didn't have anything to do with it. As far as I know the records are ac-

curate; there is a slight chance that they may not be." [Tr. p. 58.]

The bill and daily cash receipts marked as aforesaid respectively, U. S. Exhibits III and IV, were then offered in evidence by the Government [see Tr. bottom of p. 57], received by the court over the objection of the defendant that each of them was "incompetent, irrelevant and immaterial and not the best evidence and hearsay" [Tr. p. 58], and marked U. S. Exhibits III and IV. [See Tr. pp. 60-61.]

After the admission of the documents, as shown by the minutes of trial on November 21, 1916 [Tr. p. 23], there was considerable argument as to the admissibility of the evidence, and finally the jury was recalled into court and the case continued until the next day.

On the next day the Government called as a witness one Myrl Stetzel, a clerk of the Western Union Company in San Diego in the month of November, 1915. She testified that U. S. Exhibit No. III was a carbon copy of a bill for telegrams for the month of November and that the original thereof was addressed and mailed to J. B. Miller, Victoria Apartments. That she made the bill out from the telegrams on file in the office; that the document does not show what year it was made out and that the date was on the original bill, but not copied on the copy. [Tr. p. 63.] That the carbon copy of the bill is simply a copy of that part of the bill that she wrote and rendered, and that there was other printed matter on the bill that was rendered that does not appear on the carbon copy (U. S. Exhibit 3) and that the bill rendered had a date on it and U. S. Exhibit No. III does not. That when she went to make

up the bill, she made it up from what purported to be a telegram which was taken over the telephone, and which purported telegram she did not know how got into the office, or who wrote it, or where it came from. That she just found it among the files in the office, and following her usual course of business made the bill (U. S. Exhibit 3) from the information that was contained on the purported telegram. [Tr. p. 65.]

That she had no personal information from any source whatsoever as to the amount of the charge, or when it was made or anything else, except what she got from the telegram she found in the office, which telegram, according to the rules of the office, indicates that it was telephoned into the office. Also that the telegram was in the handwriting of one Hartley Shaw. [Tr. p. 66.]

Etta Naylor, cashier of the Western Union Company in San Diego in November, 1915, was then called and shown U. S. Exhibit No. 4, which she testified was the cash register for December 9th and was in her handwriting. The following question was then asked by the United States attorney:

"Q. I will show you a carbon copy of a bill which has been introduced in evidence as United States Exhibit No. 3 and ask you if you can show from the Exhibit No. 4 whether or not the Exhibit No. 3, the bill, has been paid?"

To which question plaintiff in error objected on the grounds that it was "incompetent, irrelevant and immaterial, and asking for a conclusion of the witness."

The objection was overruled and the witness an-

swered "Yes, sir, that is my handwriting, and it pays this bill." [Tr. pp. 67-68.]

On cross-examination [Tr. pp. 68-69] she testified as follows:

"I have no independent recollection of the payment of that bill. All that I know about it is that I find it in the record kept by me, and the record shows it was paid. I assume that the \$2.53 is the amount of the bill for the month before, because it is the same amount. If another individual, or the same individual, paid the same amount for some other purpose, it would appear on my cash just the same. I do not know who paid that bill, and I have no knowledge of how it was paid. I haven't any idea whether it was paid in cash or by check, or by what individual. I don't know how the bill went out to the person who paid it, if it ever did go out, because I don't handle that part of the work. All I know is what the record shows, and the record shows that on December oth I. B. Miller is credited with cash, \$2.53."

From the above testimony it is seen that the bill for telegrams for the month of November issued to J. B. Miller (U. S. Exhibit No. 3) was made up by the clerk, in the ordinary routine of the office business, from what purports to be a telegram which somebody communicated over the telephone to Hartley Shaw, a clerk in the office of the Western Union Company, who reduced the purported message to writing. There was no evidence offered as to who telephoned the message to the Western Union office, nor does it appear what the contents of the purported telegram was, or that it was, in any way, connected with the defendant.

The purported telegram so received over the telephone was not admitted in evidence, and we submit that not only was there no foundation laid for the admission of U. S. Exhibit No. 3, but that its admission in evidence was incompetent, irrelevant and immaterial for any purpose. When taken into consideration with the prejudicial testimony of Louise Bordeau, U. S. Exhibit No. 3 certainly was extremely prejudicial to the defendant's rights to be tried by legal evidence.

And this likewise applies to U. S. Exhibit No. 4. The witness who prepared this document was permitted to state her conclusion that U. S. Exhibit No. 3, the bill, had been paid, when it is shown by her crossexamination that all she knew about its alleged payment was that the record showed its payment, and that she personally did "not know who paid that bill," or "how it was paid," or whether it was paid by cash, or by check, or by what individual, and that all that she did know concerning the matter was that U. S. Exhibit No. 4 shows that on December 9 J. B. Miller was credited with cash \$2.53, and that she assumed that the \$2.53 was the amount of the bill for the month of November, for the sole and only reason that it was the "same amount" as the amount appearing on U. S. Exhibit No. 3.

We insist that the action of the court in permitting Etta Naylor to state her conclusion as to whether or not U. S. Exhibit No. 3 had been paid is too clearly erroneous for any extended discussion or citation of authorities. The testimony of the witnesses as shown by the transcript, and as set forth in substance above, shows clearly that it was not the best evidence of the

payment of any bill but merely a conclusion of the witness, the effect of stating such conclusion being but to further impress upon the minds of the jury the testimony of Louise Bordeau in reference to the telegrams.

Absolutely no evidence stands in the record connecting, or even tending to connect, the defendant with any bill for telegrams issued to J. B. Miller for the month of November, nor is there any evidence that J. B. Miller paid any bill for telegrams issued in that month. We see no way that these exhibits could properly be introduced without in some manner connecting them with the defendant, or by some proof first shown that the telegrams were sent; that they were sent by the defendant in this case; that their contents was material and relevant to issues here involved and that they had been paid for by the defendant or by someone else with his knowledge.

We insist that their admission violated each and every ground of our objection to their introduction and that they were incompetent, irrelevant and immaterial, not the best evidence and hearsay.

#### POINT FOUR.

The Court Erred in Denying Defendant's Motion to Instruct the Jury to Find a Verdict of Not Guilty, on the Ground of the Insufficiency of the Evidence to Sustain a Conviction.

#### POINT FIVE.

The Court Erred in Rendering Judgment Against the Defendant for the Reasons Set Forth in Paragraphs VI, VII, VIII and IX of the Assignments of Error. (Tr. pp. 102-103.)

The above errors are all based upon the insufficiency of the evidence to sustain the conviction of the defendant by the jury, and will therefore be discussed together.

In presenting this particular matter, plaintiff is not unmindful of the rule that if there is any evidence whatsoever to sustain the verdict, this court will not disturb the verdict of the jury. But plaintiff in error proposes to show by a resume of all the evidence introduced that this is one case where a reading of the record will not only convince one of the strength of the point raised, but will show conclusively that the jury was led to convict the defendant by reason of the erroneous admission of the prejudicial evidence hereinbefore discussed.

It must not be forgotten in discussing the actual evidence standing in the record that the court struck out all of the testimony of the witness Louise Bordeau in reference to the contents of the telegrams.

Also it must be kept in mind that to sustain the conviction there must be some evidence of the following elements of the offense:

1st. That the defendant persuaded, induced or enticed Vida Rogers to go from San Francisco to Tia Juana.

2nd. That he intended that, and his purpose in so persuading her, etc., was that she should and would, when and after she reached Tia Juana, personally engage in prostitution, debauchery, or some other immoral practice of the same sort or kind.

With these considerations in mind, let us examine the testimony of the witnesses against the defendant.

The witness, Louise Bordeau, testified in substance that she was a prostitute following, in the month of July, 1915, her vocation in a house of prostitution at No. 43 Washington alley, in the city of San Francisco, conducted by Vida Rogers. [Tr. p. 36.] That she first met the defendant in the summer time, when she was working in the house of prostitution. That Vida Rogers introduced him to her; that she only saw him there perhaps three or four times in all the time she was working at Washington alley. That the next place she saw the defendant was in Tia Juana. [Tr. p. 43.] That on the first day after Thanksgiving, 1915, she, in company with Vida Rogers, left San Francisco and went by train to San Diego.

That when she reached Tia Juana she engaged in prostitution in the "Palace," the house of prostitution run by Vida Rogers, the landlady. That when the

house was first new she saw the defendant there quite often. That Vida Rogers was required to get a license to run the house, which license was issued by the Mexican Government. That on the day she arrived in San Diego with Vida Rogers the defendant was at the train and talked with Vida Rogers a few minutes and that some short time later she saw Vida Rogers get into a stage that had a sign on it that said "To Tia Juana, Mexico." [Tr. p. 69.]

Dave Gershon testified that he had been in Tia Juana about ten days or two weeks ago and saw Vida Rogers at that place; the balance of his testimony being contradictory statements as to whether he did or did not have a subpoena to serve on her.

Ernest Estudillo testified that he resided in Tia Juana in November, 1915; that he knew a place in Tia Juana called the "Palace," which was a house of prostitution; that he knew the landlady, whose name was Vida; that he was sent by the subprefecto of Tia Juana down to the Palace to work there as a policeman and that he saw the defendant there a good many times; that the defendant gave an order to one Tony to pay him his wages and that Tony, who appeared to be the manager, paid him for his services.

Charles H. Cousins testified that he was a carpenter and built the "Palace" in Tia Juana; that the defendant authorized him, hired him and paid him for building it. H. M. Stanley, a police officer in San Diego, testified that he knew the "Palace" and that it was a house of prostitution. Also that he knew the defendant, with whom he had a conversation in which the defendant, in answer to a question asked him by the witness, said: "I will see my landlady and she may give you this information"; also that the defendant said, when cautioned by the witness in reference to the "Palace": "Well, I am in the clear; I don't run it but my landlady runs it for me."

Julian Cliff testified that in November, 1915, he was manager of the Victoria Apartments in San Diego and that the defendant occupied an apartment at that place at that time. That the defendant had the house system telephone in his apartment, which was connected up with the exchange; that the special connection was made either at Mr. or Mrs. Miller's request. That the office 'phone of the Victoria Apartments was Main 3857 and the number of the 'phone in the defendant's apartment was Main 6626.

Arthur Mosedale testified that he was employed by the telephone company in San Diego and on October 11, 1915, installed a telephone in the defendant's apartment at the Victoria Apartments, the number of which was Main 6626.

F. A. Bennett, Etta Naylor and Myrl Stetzel testified that they were employed by the Western Union Telegraph Company at San Diego and gave explanatory testimony concerning United States Exhibits I, III and IV. In substance their testimony was to the ef-

fect that the records were true and correct to the best of their knowledge and that U. S. Exhibits III and IV were taken from and made up from certain telegrams which were marked for identification, but which the court refused after objections to admit in evidence. The testimony of these witnesses is more fully discussed in detail under the point raised as to the error of the court in admitting in evidence United States Exhibits I, III and IV and is, therefore, in order to avoid repetition, not set forth here.

An examination of the transcript will show that the substance of the testimony of all the witnesses in the case is, upon all salient points, hereinabove set forth in full.

If there is one single shred or particle of evidence in this case which can, by the strongest stretch of the imagination, be gleaned from the record that points to any persuasion, or inducement, or enticement, on the part of the defendant, of Vida Rogers to go from San Francisco to Tia Juana, we would certainly be most pleased if the United States attorney will point it out to us in the brief he files herein.

And likewise, if there is a single, solitary shred of evidence in this record that the defendant had the intent and purpose that Vida Rogers should engage in the prastice of prostitution, or debauchery, or manage a house of prostitution, in Tia Juana, or elsewhere, it would be gratifying to us to know where that evidence can be found.

In the case of Welsch v. United States, 220 Fed. 269, it is said:

"Undoubtedly, the gist of the alleged offense is the intention which underlies words and acts and gives them significance."

See also decision in Johnson v. U. S., 215 Fed. 679-683.

And in the Athanasaw case the Supreme Court of the United States approved the instructions of the trial court to the jury that:

"The intent and purpose of the defendant at the time \* \* \* is the very gist and question of this case."

The late case of Gillette v. United States, 236 Fed. 215, in holding that the evidence was insufficient to warrant a conviction, uses this language:

"When the girl arrived in Moorehead (it was proven in this case that Gillette had persuaded her to go), the offense with which Gillette was charged was complete, providing the requisite intent and purpose was behind the journey. \* \* \* His intent and purpose, of course, must be found from his acts, declarations and conduct. There is no evidence to show that Gillette, at the time he asked the girl to come to Moorehead, had the intent and purpose that the girl should engage in the practice of debauchery and illicit sexual intercourse, and hence the charge made by the indictment was not proven. Taking these facts into consideration, we are of the opinion that there is not substantial evidence to sustain the conviction."

There can be no doubt that the defendant built a building in Tia Juana, and that the place was used as a house of prostitution, but there is no evidence that the defendant ran it, or that he owned it, or participated in any way in its profits. But assuming that he did own it, would it be unlawful to permit prostitution to be carried on in it in a country where that business is recognized by the law as a legitimate business and licensed as such?

Louise Bordeau testified that the license to run the house was procured by Vida Rogers; that she also was licensed to sell liquors and tobacco, but the charge in this case is not that the defendant had built a house in Tia Juana which was conducted by Vida Rogers as a house of prostitution, but that the defendant persuaded and induced Vida Rogers to come from San Francisco to Tia Juana for the immoral purpose of managing the house.

Where is the evidence showing that the defendant persuaded her to come?

There is not a witness in the case who testified concerning any persuasion or inducement on the part of the defendant. The witness Louise Bordeau had seen the defendant only on three or four occasions before she left San Francisco, in November, 1915, and these occasions were months prior to Thanksgiving day in November, 1915. She does not even testify as to having had a single conversation with him, either in San Francisco, Tia Juana or elsewhere. After meeting him in San Francisco in July, 1915, she testifies, as shown on page 43 of the transcript, that "The next place I saw the defendant was in Tia Juana." Later on, as the last witness to testify, she was recalled and stated that when she and Vida Rogers arrived in San Diego the defendant was at the train for a very few minutes.

She could not recall any conversation held there by the defendant, and said in reference thereto, "It was just 'hello'; that is all I know." In view of her previous testimony that she never saw the defendant from the time she had met him months ago in San Francisco, until she saw him in Tia Juana, we cannot, in view of her lack of information concerning what happened at the depot in San Diego, believe that she told the truth in regard to seeing the defendant there at that time. But whether she did or not, it is immaterial and is only mentioned here for the purpose of showing what little reliance can be placed upon her testimony.

Further comment on the testimony of the witnesses Cliff, Gershon, Cousins, Mosedale, Naylor, Stetzel and Bennett is unnecessary and would be trifling. Nothing in what they said goes to the support of any of the elements of the offense charged.

Nor can the Government obtain any solace or comfort from the testimony of the witnesses Estudillo and Stanley. The former merely testified that he was a policeman, sent down to the house by the subprefecto of Tia Juana, and was paid for his services by one Tony, who was the bartender and appeared to be the manager. Also, that Mr. Miller gave an order to Tony to pay him; and Stanley testified that he had a conversation with the defendant, wherein he stated that his landlady ran the house for him.

But again, we must remember that the defendant was not tried for building a house which he may or may not have owned, or which may or may not have been leased to a person who was running it as a house of prostitution. We respectfully submit that an entire reading of the record will fail to disclose any evidence whatsoever tending to show that the defendant either persuaded, induced or enticed Vida Rogers to go from San Francisco to Tia Juana, or that he had any intention whatsoever that she would engage in the practice of prostitution or debauchery, or any other immoral practice within the meaning and purview of section 3 of the statute.

#### POINT SIX.

#### Instructions.

The court erred in instructing the jury as follows:

"You are instructed that before you can convict the defendant in this case, the proof must satisfy you beyond a reasonable doubt of the following facts:

First. That the defendant did knowingly, unlawfully and wilfully persuade, induce or entice Vida White, alias Vida Rogers, to go from the city of San Francisco, California, or other place in the state of California, to the town of Tia Juana, Mexico;

Second. That in so going, the said Vida White, alias Vida Rogers, went upon the line or route of the Southern Pacific Railroad Company, a common carrier from the city of San Francisco, in the course of her journey, and that she went by automobile stage, a common carrier from the city of San Diego, California, to the town of Tia Juana, Mexico, and not otherwise.

It is not necessary, I charge you, for the Government to show that she went all the way from

the city of San Francisco to the city of San Diego on the Southern Pacific Railroad. The important thing in this connection is that she traveled by a common carrier, engaged in foreign commerce on her route, after she had been persuaded, induced or enticed, as aforesaid.

That at the time the defendant so persuaded, induced or enticed said Vida White, alias Vida Rogers, to go to Tia Juana, Mexico, from the state of California, it was for the purpose of prostitution, debauchery, or some other immoral purpose of the same sort and kind, and that the defendant intended that Vida White, alias Vida Rogers, should and would, when and after she reached Tia Juana, in the republic of Mexico, personally engage in prostitution, debauchery, or some other immoral practice of the same sort and kind. And I instruct you in this connection that if the said Vida White, alias Vida Rogers, was placed by the defendant in a house of prostitution in the town of Tia Juana, for the purpose of having her remain therein, and for the purpose of having her manage a house of prostitution as landlady or superintendent, that that is an immoral purpose within the meaning of the law. It is not necessary for the Government to prove that the defendant paid any part of the expenses of the said Vida White, alias Vida Rogers, in going to said Tia Juana, Mexico." [Tr. pp. 75-76.]

The third subdivision of the above instruction, we contend, is erroneous. In one breath the court charges that before the defendant can be convicted, the jury must be satisfied that the defendant "intended that Vida White, alias Vida Rogers, should and would, when and after she reached Tia Juana, in the republic

of Mexico, personally engage in prostitution, debauchery, or some other purpose of the same sort and kind," and in the next breath charges that "if the said Vida White, alias Vida Rogers, was placed by the defendant in a house of prostitution in the city of Tia Juana, Mexico, for the purpose of having her remain therein, for the purpose of having her manage a house of prostitution, as landlady or superintendent thereon, that that is an immoral purpose within the meaning of the law."

By this instruction the jury are told that the practice of personally engaging in the business of managing a house of prostitution, as landlady or superintendent, regardless of whether or not the landlady or superintendent prostitutes or debauches her own body, or permits others to do so, is an immoral practice of the same sort and kind as prostitution and debauchery. With this we cannot agree. There can be no doubt that the purpose of having Vida Rogers manage a house of prostitution would be an immoral purpose, but, as contended on our argument on the demurrer to the indictment, the only immoral purpose or practice that is contemplated by the words, "other immoral purpose" and "other immoral practice," is one which is of the same sort or kind as debauchery and prostitution

As further shown by the argument under point one, *supra*, the courts have held that "prostitution" means that the woman is "to offer her body to indiscriminate sexual intercourse with men, either for hire, or without hire." (Suslak v. United States, 213 Fed. 914); and that "debauchery" is "used in the statute with refer-

ence to immoral sexual relations." (Gillette v. United States, 236 Fed. 215.)

In every case which has been decided, the transportation of the woman has been for the sole purpose of personal prostitution, or personal debauchery. In no case has it been decided that transportation for the purpose of having women commit acts which might eventually lead or tend to their moral degeneracy is sufficient to justify prosecution under the act.

We submit, that the argument and authorities cited in the points raised under point one herein are directly applicable, and apply with great force to the proposition raised here, and we respectfully request the court to again read that portion of this brief, keeping in mind the parts of the instruction quoted above, and which we here complain of.

We also allege, that in lieu of the last paragraph of the above instruction given to the jury, the court should have instructed as we requested in our instruction No. 21, which was refused. This instruction was framed in accordance with the holding of the court in the Athanasaw case (227 U. S. 326), in reference to what proof was necessary to convict under an indictment charging a purpose of debauchery. It is as follows:

"It is not sufficient to warrant a conviction of the defendant that he intended that Vida White, alias Vida Rogers, should, after she reached Tia Juana, in the republic of Mexico, act as landlady or housekeeper in a house of prostitution, or manage or operate such a house, unless it was the intention of the defendant that said Vida White, alias Vida Rogers, should, as a result of leading such a life, eventually give herself up to a condition of debauchery which would eventually lead to a course of sexual immorality on her part."

There are other general instructions requested by the defendant, and refused by the court, which instructions are set forth in the assignment of errors, and which we are of the opinion should have been given to the jury by the court, but owing to the length of this brief, and our confidence in the merits of the points we have already raised herein, we will confine ourselves to but one more instruction, the giving of which we are convinced was a serious error.

The jury, after receiving their instructions from the court, retired to deliberate at 2:20 o'clock p. m. They returned into court at 4:40 p. m., when the following proceedings [Tr. p. 81] were had:

"The Court: I have a note, presented to me by the bailiff in charge of the jury, reading as follows:

'Can the jury construe a mutual agreement to be persuasion or inducement? L. J. Bradford, foreman.'

Do you desire an instruction on that subject, gentlemen.

The Foreman: We do.

The Court: The statute, as I read it to you, reads that 'Any person who shall knowingly, persuade, induce, entice or coerce, or cause to be persuaded, induced, enticed or coerced, or aid or assist in persuading, inducing, enticing or coercing any woman,' and so forth.

It is entirely proper for me to instruct you on the subject on which you inquire.

Now, according to the Standard Dictionary, one of the definitions of the words 'induce' is 'to lead in, to introduce. Second, to draw on, to over-

spread. Third, to lead on, to influence, to prevail on, to incite, to move by persuasion or influence. Fourth, to bring on, to effect, a cause; as a fever induced by fatigue or exposure.' The synonyms of this word are: 'To move, instigate, urge, impel, incite, press, influence, actuate.'

The word 'persuade' means: 'To influence or gain over by argument, advice, entreaty, expostulation; to draw or incline to a determination by presenting sufficient motives. Second, to try to influence. Third, to convince by argument or by reasons offered or suggested from reflection; to cause to believe. Fourth, to inculcate by argument or expostulation, to advise, to recommend.' Synonyms: 'To convince, induce, prevail on, win over, allure, entice.'

Now in the Law Dictionary, the word 'inducement' in contracts is 'That the benefit or advantage which the promissor is to receive from the contract is the inducement to make it.'

In criminal evidence it is 'The motive which leads or tempts to the commission of crime.'

Now, with those definitions in mind concerning these words, I instruct you that a consideration for entering into an agreement is an inducement to enter into the agreement. I think probably you understand the situation now."

The jury again retired at 5:00 o'clock p. m. [Tr. p. 83], and returned again into court a few minutes later; to be exact, at or about 5:02 o'clock p. m. [Tr. p. 28], and presented their verdict. Through mistake and inadvertance of counsel, an exception was not at the time reserved to the giving of the above instruction, but it was later granted by the court [see minutes of trial, Tr.

p. 31], and while it may be perhaps irregular, yet, in view of the quick return of the jury with its verdict after the instruction was given to them, we ask this court to review same.

It is apparent from the note presented to the court by the foreman of the jury that the jury had decided in their own minds that Vida Rogers and defendant had a mutual agreement concerning the running of the "Palace" in Tia Juana. The record and transcript fails to show any testimony from which the jury could draw this inference and inasmuch as there was absolutely no evidence showing any agreement, or even in the slightest degree tending to show any agreement, between Vida Rogers and the defendant, we are at a loss to find upon what basis or theory the court instructed it "that a consideration for entering into an agreement is an inducement to enter into the agreement."

Even if there was any evidence tending to show that there was an agreement between the defendant and Vida Rogers there is no evidence showing, or tending to show, that it was made prior to the time Vida Rogers left San Francisco and arrived in Tia Juana, or that it was made within the United States.

The evidence shows that Vida Rogers was a woman between 35 and 40 years of age. [Tr. p. 46.] It is also shown that in the month of November, 1915, she was engaged in conducting a house of prostitution as landlady thereof in the city of San Francisco and no doubt, Vida Rogers, had been engaged in this nefarious practice for a good many years. True, the evidence shows that Vida Rogers conducted a house of prostitu-

tion in the city of Tia Juana in a building which was built by defendant the next month after Vida Rogers arrived in Tia Juana, and if this was evidence of any agreement (which in our opinion is not), yet, there is no evidence showing or tending to show that the agreement was even started or consumated within the boundaries of the United States. It is quite possible that Vida Rogers, seeking a more lucrative field, for her activities, than San Francisco went voluntarily to Tia Juana, where gambling and horse racing was rife, and there made an agreement freely and voluntarily and of her own accord with the party who owned the "Palace" at that time (the evidence fails to disclose who the party was) to conduct that place in any manner or for any purpose that she saw fit. Nor is there any evidence to show that any of the acts of Vida Rogers were not done upon her own volition, or that her journev was not first conceived in her own mind and executed of her own accord. Certainly, there is no evidence that the defendant had anything to do with what she did, nor is there any evidence to show that he even had knowledge of what she was going to do. Granting for the sake of argument that Vida Rogers went from San Francisco to Tia Juana and there met the defendant, with whom she made an agreement in reference to the leasing of the building built by the defendant for conducting it as a house of prostitution, yet, unless it was shown that the defendant induced or persuaded her to come from San Francisco to Tia Juana for an immoral purpose there could be no violation of the law.

Furthermore, the term inducement, or more properly the word "induce" used in the statute, refers to an intent on the part of a person to instigate, urge, impel or influence a girl or woman to go "from one place to another in interstate or foreign commerce," and is in no wise connected with a "consideration for entering into an agreement" as used in the language of the court in the above instruction.

The question asked by the jury in the note it presented to the court was whether or not the jury could construe a mutual agreement to be persuasion or inducement and the court instructed the jury, not upon the subject of which they inquired, but did instruct it, "that a consideration for entering into an agreement is an inducement to enter into the agreement."

We will be pleased to have the United States attorney point out to us in his brief what the inducement in reference to the consideration in an agreement has to do with the inducement or persuasion on the part of a person in causing a woman to go from one place to another in foreign commerce.

We most earnestly contend that the errors and omissions occurring at the trial of this cause, and pointed out to the court in this brief, should be corrected by this Honorable Court, and that the verdict of the jury in this cause should be set aside.

Respectfully submitted,

ALFRED F. MACDONALD,

JUD R. RUSH,

Attorneys for Plaintiff in Error.



### **United States**

# Circuit Court of Appeals,

FOR THE MINTH CIRCUIT.

James B. Simpson, Indicted as James B. Miller,

Plaintiff in Error,

US.

The United States of America,

Detendant in Error.



#### BRIEF OF DEFENDANT IN ERROR.

Albert Schoonover,
United States Attorney;
J. Robert O'Connor,
Assistant United States Attorney;
Clyde R. Moody,
Assistant United States Attorney,
Counsel for Defendant in Error.



#### No. 2943.

### **United States**

## Circuit Court of Appeals,

#### FOR THE NINTH CIRCUIT.

James B. Simpson, Indicted as James B. Miller,

Plaintiff in Error,

US.

The United States of America,

Defendant in Error.

#### BRIEF OF DEFENDANT IN ERROR.

#### ARGUMENT ON DEMURRER.

The plaintiff in error in this case was convicted by a jury on the second count of an indictment containing two counts, the charging part of the count upon which he was convicted reading as follows:

"That James B. Miller \* \* \* on or about the 26th day of November, 1915, within the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly, unlawfully and wilfully per-

suade, induce and entice a certain woman, to-wit: one Vida White, alias Vida Rogers, whose full and true name other than as herein stated, is to the grand jurors unknown, to go from one place to another in foreign commerce, that is to say, to go from the city of San Francisco, state of California, to the town of Tia Juana, in the Republic of Mexico, via the Southern Pacific Railroad Company, a common carrier, from the said city of San Francisco to the city of San Diego, California, and via automobile stage, a common carrier, from the city of San Diego, California, to the town of Tia Juana, Mexico, for a certain immoral purpose, to-wit, for the purpose of having said Vida White, alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse."

This indictment was obviously drawn under section 3 of the Act of June 25, 1910, commonly known as the "Mann White Slave Act," said section reading as follows:

"That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or

assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court."

The plaintiff in error interposed a demurrer to the second count of the indictment upon which he was convicted and assigns as error the overruling by the lower court of his demurrer to such second count of the indictment.

Counsel for plaintiff in error argue but two points on their demurrer, one that the second count of the indictment does not state facts sufficient to constitute an offense against the laws of the United States, and the other that the said second count of the indictment does not substantially conform to or comply with the requirements of section 950 of the Penal Code of the state of California, the state in which the lower court was holden.

As to the first ground of demurrer argued in the brief of plaintiff in error, it will be observed from a careful reading of section 3 of the act under which the indictment is drawn that there are several offenses described therein, two of which are as follows:

(a) The offense of knowingly persuading, inducing, enticing, or coercing, or causing to be persuaded, in-

ducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery or for any other immoral purpose.

(b) The offense of knowingly persuading, etc., any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, with the intent and purpose, on the part of such person, that such woman or girl shall engage in the practice of prostitution or debauchery or any other immoral purpose, whether with or without her consent, and who shall thereby knowingly aid or assist in causing such woman or girl to be carried or transported as a passenger on the lines or route of any common carrier, etc.

The second count of the indictment having followed the language of the statute in its charging part, as to the first of these offenses above described, undoubtedly charges an offense against the laws of the United States if the immoral purpose as set out in the indictment is such an immoral purpose as is contemplated by the statute. The immoral purpose, as set out in the indictment, is "for the purpose of having said Vida White, alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse."

Counsel for plaintiff in error argue to this court that this immoral purpose set out in the indictment, while undoubtedly most reprehensible and immoral, is not such an immoral purpose as was contemplated by the statute. They argue that by the doctrine of ejusdem generis the "other immoral purpose" spoken of in the state must be such an immoral purpose as would result in the personal sexual debasement of the woman or girl so transported. Even following the strictest interpretation of the doctrine of ejusdem generis, it is difficult for us to follow the reasoning of counsel for plaintiff in error through to their conclusion that the immoral purpose as set out in the indictment is not of the same character as prostitution and debauchery. A person with the least vestige of morality could not be mistress of a house of prostitution, and such a place is only calculated to further the licentiousness and immorality of all of its inmates, including the mistress. If such a purpose is not an immoral purpose within the meaning of the statute, then we cannot conceive of any reason for the addition of the words "any other immoral purpose" to the statute. The immoral purpose described in the indictment most certainly has to do with debauchery, with prostitution and with the disintegration of the morals of every person connected with such house of prostitution, either as inmate or mistress. We have carefully examined all of the authorities referred to by counsel for plaintiff in error upon this point, and we believe that the case of Athanasaw v. United States, 227 U.S. 326, enunciates the true rule, and we believe that this court will follow the ruling in that case. The court in that case approved the instructions of the lower court to the effect that "the statute had a more comprehensive prohibition and was designed to reach acts which might ultimately

lead to that phase of debauchery which consisted in sexual actions." We do not believe that it is necessary to cite any further authority upon this point. The preservation of a pure mind and body by a mistress of a house of prostitution is so foreign to human experience and reason that counsel's argument on this point, while ingenious, is certainly not persuasive, and we have no hesitancy in believing that this court will declare the transporting or inducing of a woman to go in interstate or foreign commerce to become mistress of a house of prostitution falls squarely within the term "or any other immoral purpose" used in the act.

As to the second ground of demurrer argued in the brief of plaintiff in error that the indictment does not conform to the California Penal Code, we will only state that we find no authority for the contention of counsel of plaintiff in error that such must be the case, nor have they cited any authority supporting this contention. In the United States courts it is only necessary that the indictment sufficiently charge the offense as laid in the statute and with sufficient particularity to apprise the defendant of the nature of the offense with which he is charged and to enable him to prepare his defense.

The second count of the indictment in question follows the language of the statute and sets out the offense to such a degree that there is no ground for doubt as to the nature of the offense charged against the defendant.

#### STATEMENT OF FACTS.

Inasmuch as the brief of plaintiff in error dwells at great length upon the insufficiency of the evidence, we believe that it would materially assist the court in passing upon this point and others raised by plaintiff in error if we should outline the evidence in this case. It will be remembered at all times that no witnesses were produced except those produced on behalf of the Government, and in the absence of any impeaching testimony or contradictory testimony we must accept their testimony at its full face value. To begin with, the plaintiff in error was indicted as James B. Miller, and was known as James B. Miller to all of the witnesses testifying on behalf of the Government and for convenience we shall use this name in our argument. When he was arraigned under the indictment, he gave his true name as James B. Simpson [Tr. 9]. The first witness on the part of the Government was Louise Bordeau. In 1915, she was living in San Francisco, and while living there knew a woman in San Francisco by the name of Vida Rogers, who also was known as Vida White. Louise Bordeau met Vida White in a house of prostitution at number 43 Washington alley, where Vida White was the mistress, or housekeeper, and Louise Bordeau was an inmate. This was about July, 1915. She first met defendant in San Francisco while she was practicing prostitution at number 43 Washington alley. Vida Rogers introduced James B. Miller to her and she saw him a number of times at this house of prostitution at number 43 Washington alley, San Francisco. She knew Miller under the name

of Jim Miller. The day after Thanksgiving, 1915, she left number 43 Washington alley with Vida Rogers. Vida Rogers also maintained a residence at the Berkeley Hotel. Shortly before these women left San Francisco, Vida Rogers received two telegrams the contents of which Louise Bordeau related (the contents of both of these telegrams were subsequently taken from the jury). They left via Southern Pacific Railroad from San Francisco, and had through tickets to San Diego [Tr. 69]. The defendant met them at the depot in San Diego. Louise Bordeau remained over night in San Diego, and she saw Vida White get on a stage marked "To Tia Juana, Mexico," and the next day she saw her at The Palace in Tia Juana, Mexico, and Miller was also there [Tr. 54]. Louise Bordeau remained in The Palace, which was a house of prostitution, from the time she arrived there, in November, 1915, until after the flood, which was some time in January, 1916, during all of which time Vida Rogers was the landlady or mistress of The Palace.

Miller visited The Palace several times while Louise Bordeau was an inmate, and when there ate at the restaurant for the girls connected with The Palace. She heard him state that he owned The Palace [Tr. 44-45]. There were about twenty-two girls connected with The Palace. Louise Bordeau got a license from the Mexican officials to practice prostitution, and Vida Rogers got a license also to run a house of prostitution. It hung on the wall of the bar room in The Palace. She also had a license to sell liquors and tobacco.

David Gershon, a witness called on behalf of the Government, testified that he was a special agent of the department of justice; that about ten days before the trial he saw Vida Rogers in Mexico, and that he had been endeavoring since February or March of 1916 to serve her on this side of the line with a subpoena in this case. He did not have a subpoena, but, being a special agent of the department of justice, expected to hold her until a subpoena could be secured if he could catch her on this side of the line.

Ernest Estudillo testified on behalf of the Government that he knew the defendant James B. Miller, and that he went to work for him in Tia Juana about the 29th day of December, 1915, at The Palace, which he knew to be a house of prostitution. Mr. Miller gave an order to Tony, the bartender at that place, to pay the witness his fees. He was acting as a special officer.

There were two buildings at The Palace, one known as the old building, which contained a kitchen, dining room, bar and five rooms, and the new building, which contained eighteen or twenty rooms.

Charles H. Cousins testified on behalf of the Government that he was a carpenter and builder and resided in San Diego; that he had known the defendant for about two years; that he built The Palace in Tia Jauna for the defendant, who paid him for building it. He built both the old and the new buildings, but the old building was built some four or five months before the new building and was built for a man named Savin.

H. M. Stanley, a witness on behalf of the Government, testified that he was a police officer in San

Diego; that he knew The Palace in Tia Juana and had known it since it opened; that he knew the defendant and had seen him at Tia Juana at The Palace. On one occasion, he had a conversation with him about The Palace when he went with an officer named Whistler to investigate a couple of the girls at The Palace. He asked Miller in regard to these girls, and he said: "I will see my landlady and she may give you this information." Miller consulted the landlady, whose name was White, in the presence of Stanley, after which Stanley said: "You might run up against a snag, Miller, in running this place," and Miller replied: "Well, I am in the clear. I don't run it, but my landlady runs it for me." The witness knew The Palace to be a house of prostitution.

The balance of the testimony, as set out in the transcript of record, was largely taken up with an effort on the part of the prosecuting attorney to introduce into evidence certain telegrams, which he stated in his opening statement to the jury were sent by Miller from San Diego to Vida White in San Francisco, and by Vida White from San Francisco to Miller in San Diego, but these telegrams were refused admittance by the court.

Julian Eugene Cliff testified on behalf of the Government that he resided in San Diego, California, and in November, 1915, was the manager of the Victoria Apartments in San Diego, located at number 1069 Tenth street; that he knew the defendant Miller, and that Miller had an apartment at his house in November, 1915, the number of which was 31. Miller had a telephone in his apartment, and he had a special num-

ber for this telephone, which was Main 6626; the defendant's wife lived there with him.

Arthur William Mosedale testified that he was an employe of the telephone company, and on October 11, 1915, installed a telephone in apartment 31 of the Victoria Apartments in San Diego, the number of which was Main 6626.

F. A. Bennett testified that he was manager of the Western Union Telegraph Company at San Diego, and had been since 1912; that he knew the defendant Miller, and that Miller had a charge account with the Western Union in San Diego. He presented a charge card issued to J. B. Miller by the Western Union Company, which was introduced as Plaintiff's Exhibit I and which is set out on page 54 of the transcript. Witness was shown a telegram which was designated United States Exhibit 2 for Identification, concerning which he testified that it was a part of his office records and was a telegram which was received by telephone to be sent and that it was sent; that it was filed November 15th and sent November 16th, and that he could tell from looking at the telegram from what number it was telephoned; that in the due course of the business of the Western Union Telegraph Company, when a telegram was received over the telephone it was placed on a special blank, which blank showed the date, the telephone number from which it was telephoned, the originating point, the destination and the trancript of what was said over the telephone. All these things were done in this instance according to the due course of business of the said company. Witness produced a carbon copy of a bill rendered to Mr. Miller for November, 1915, which was marked United States Exhibit 3, and a daily cash receipt record which was marked United States Exhibit 4. The telegram known as United States Exhibit 2 for Identification, according to Exhibits 3 and 4, was charged to Mr. Miller's account and was paid for. United States Exhibits 3 and 4 were received in evidence, but 2 for Identification was refused. Exhibits 3 and 4 are set out on pages 60 and 61 of the transcript. All these records conformed to the routine of the office of which the witness was manager.

Witness further testified that Exhibit 2 for Identification conformed in all particulars to the rules of the company and was the original telegram on file in the office at San Diego.

Myrl Stetzel testified that she was a clerk in the office of the Western Union at San Diego, California and was such clerk in November, 1915. She testified that she made out the bill known as Plaintiff's Exhibit 3 and mailed the original to J. B. Miller, Victoria Apartments, and that she made the bill from the telegrams on file in the office.

Etta Naylor testified that she was cashier for the Western Union and was such during the month of November, 1915, and that Plaintiff's Exhibit 4 was made out by her in the due course of business.

F. A. Bennett, recalled as a witness for the Government, testified that United States Exhibit 5 for Identification was a telegram taken from the files of the office at San Diego and was the original record on file there. It bore sending marks which it would not bear unless it had been sent. United States Exhibit 6 for Identifi-

cation was a copy of a telegram received at San Diego on November 26, 1915, the original of which was delivered in San Diego. Exhibit 7 for Identification was the delivery sheet of the Western Union for November 26, 1915. The Government offered the telegram received and delivered in San Diego, known as United States Exhibit 6 for Identification, together with Exhibit 7 for Identification, the delivery sheet, in connection with the bail bond filed in the case by the defendant. The bond was offered for the purpose of placing in evidence an exemplar of the signature of the defendant, and was offered on the theory that it was a part of the files of the case filed by the defendant purporting to be signed by him on its face, and he was therefore bound by the instrument which he filed in the case unless such instrument were overturned by affirmative evidence. The court refused to allow the bond to be used as such exemplar, and refused the admission of United States Exhibits 5, 6 and 7 for Identification.

### ARGUMENT.

Point two argued by counsel for plaintiff in error on pages 22 et seq. of the brief has to do with the court's admitting certain evidence into the record which was subsequently stricken out. The prosecuting attorney offered to prove by the witness Louise Bordeau that Vida White received two telegrams in San Francisco, and in the first instance merely offered to prove that the contents of telegrams offered as United States Exhibits 2 and 5 for Identification were the same as the telegrams received by Vida White in San Francisco

without revealing to the jury the contents of the telegrams received by Vida White or the contents of those offered for identification. After some argument, the prosecuting attorney explained to the court that Vida White was without the jurisdiction of the court and he expected so to prove, and upon his offering so to prove this point the court suggested [Tr. 40] that the better way to proceed was to have the witness relate from memory what was received in the telegrams by Vida White.

Counsel for plaintiff in error, on pages 30-31 of the transcript, censure the prosecuting attorney in no light terms for his statement that he would prove that Vida White was without the jurisdiction of the court, and states: "No proof of this alleged fact was made and again did a man's liberty hang in the balance by the slender thread of a promise unfulfilled and unkept."

Counsel in their ardor have overlooked the testimony of the witness Louise Bordeau, that the last time she saw Vida White she was in Mexico; of the witness Stanley that he saw her in Mexico, and of the witness Gershon who saw her in Mexico ten days before the trial and who was waiting for an opportunity to secure her as a witness at the trial of this case. Therefore. the prosecuting attorney fulfilled his promise to the court and showed that the recipient of the telegrams was not within the jurisdiction of the court, and against his better judgment [Tr. 40], but, at the suggestion of the court, proceeded in the manner suggested by the court, to-wit, to allow the witness Louise Bordeau to testify as to the contents of the telegrams received by Vida White in San Francisco. The prosecuting attorney was induced to take this procedure because of his unqualified belief in the admissibility of the telegrams offered for identification and of the other exhibits offered for identification, which would have shown beyond doubt the connection of the defendant with the telegrams offered and the ones received by Vida White in San Francisco. This statement is made merely to correct the allegations of counsel that the prosecuting attorney was not fair in the trial of the case.

We do not believe that there was any error on the part of the court in permitting the witness Louise Bordeau to testify to the contents of the telegrams received by Vida White in San Francisco, in view of the subsequent testimony introduced on behalf of the Government and exhibits offered by the Government, but refused by the lower court, which exhibits we have asked be sent to the clerk of this court so that they may be available for inspection by this court.

There are two things necessary to constitute the crime under which this indictment was brought; first, an inducement to travel in interstate or foreign commerce for an immoral purpose; and second, the actual traveling in interstate or foreign commerce for an immoral purpose. Therefore, the inducement, as well as the traveling, of the woman becomes a part of the corpus delicti. In this case, the traveling of the woman in foreign commerce is indisputably proved. The telegrams which Vida White received in San Francisco were undoubtedly one element of the inducement for her to go. Therefore, it is our contention that the telegrams or their contents, as received by Vida White, were admissible in evidence as a part of the corpus

delicti, and the Government could then show by circumstantial evidence or otherwise that the defendant was connected with such inducement.

The telegrams as testified to by Louise Bordeau were substantially as follows [Tr. 42]:

"It was about a house with a dance hall kitchen and bar and five rooms in connection looks like a good proposition will finance everything will split fifty fifty."

and was signed "Jim."

The second telegram was to the effect

"That everything ready, leave Thursday or Friday."

Now, the house to which Vida White went in Tia Juana was the house owned by Miller and contained five rooms, kitchen and dance hall and bar room [Tr. 46]. After Vida White arrived in Tia Juana, an additional house was built containing eighteen or twenty rooms.

In regard to the second telegram, Vida White and Louise Bordeau actually left San Francisco at the time indicated in the telegram and were met by the plaintiff in error in San Diego. The plaintiff in error was further connected with telegrams sent to White in San Francisco by United States Exhibits 3 and 4, showing a charge account and the payment of the same with the Western Union Telegraph Company at San Diego, wherein two telegrams of about the same date as those testified to by Louise Bordeau were sent and charged to him and subsequently paid for. Therefore, inasmuch as the inducement is a part of the *corpus delicti* and in this case the telegrams were a part of the

inducement, we maintain that the circumstances delineated were sufficient to justify the jury in their verdict.

But there were more circumstances connecting the defendant with the telegrams testified to by Louise Bordeau which were denied admittance by the court. For instance, United States Exhibit 2 for Identification, which read as follows:

"Date 11-15-15 Central Office M. Telephone No. 6626 Class of Station Sub Originating Office

(a) San Diego Terminating Office

(b) San Francisco Kind of Message (if not day telegram)

NL

CHARGES

45

45

Paid Collect (cross off word not required)

This line \$
Orig. extra line

Term Ex. L. or O. L.—

Messenger ———

Total \$

Recording Office (if not

THE WESTERN UNION
TELEGRAPH COMPANY
Telegram Received via
Telephone

Recorder's Sig. Time filed Check HS 11.25 m 56 N.L. Pd 48

Charge

AI Gs S S AI 22 II-16 Miss Lyda White Hotel Berkley-Sutter st near Grand Av San Francisco-Cal

New House twenty foot Dance hall and bar. Eight rooms with Kitchen you had better come down and look it over. Will finance proposition. We will split fifty fifty wire me when you are coming. Special rates Yale and Harvard. Must close deal by Thursday. Looks good to me.

only record'g ofc. for (a)

Sender's name

Mr, Miller

Sender's address

Billed & Collected by

Telegraph Co.

Subscriber's name
49 Camp Mr. Miller

(Continue message on back)"

and concerning which it was testified that it was a record of the Western Union Telegraph Company in San Diego and was telephoned from the number in the upper left-hand corner of the blank, which was Main 6626, and which number was the private telephone of the plaintiff in error. This telegram was charged to the plaintiff in error and was paid for. Louise Bordeau testified that Vida White maintained an apartment at the Hotel Berkeley in San Francisco also.

United States Exhibit 5 for Identification, which read as follows:

"Date 11-23-15

Central Office
Telephone No. M 6626
Class of Station Sub
Originating Office (A)
San Diego
Terminating Office (B)
San Francisco
Kind of Message
(if not day telegram)
N L

THE WESTERN UNION TELEGRAPH COMPANY Telegram Received via Telephone

Recorder's Sig. Time filed Check V F 14 Pd WL 40

> Charge Nov 23 1915

Vida Mrs. Ida White Hotel Berkeley San Francisco Cal

CHARGES	Sutter St near Grant Ave
Paid Collect	se
(cross off word not	Be here Friday night or
required)	Saturday morning. Every-
This line \$ 40	thing ready. Wire when
	you are coming.
Orig. Extra Line	J. B. Miller
Term: Ex. L. or O. L.—	Examined
Messenger —	A
	B 41 Gs A Pd W
Total \$ 40	Billed & Collected by
	Telegraph Co.
	(Continue message on
Recording office (if not	back)"
only record'g ofc. for (a)	
Sender's name	
J. B. Miller	
Sender's address	
Subscriber's name	
Same	

was a telegram on file in the office of the Western Union Telegraph Company at San Diego which was telephoned from Main 6626.

United States Exhibit 6 for Indentification was a telegram received in San Diego and delivered to J. B. Miller, Victoria Apartments, 1069 Tenth street, and read as follows:

" Ray 445 PM 40

C252GS K 6

F D San Francisco Cal 437P Nov 26 1915 J B Miller 1069-10th

Victoria Apts 5-12 p

Concessioner San Diego Will be in tomorrow at noon.

White 453PM"

This is evidenced by delivery sheet offered as United States Exhibit 7 for Identification, which is a receipt of J. B. Miller for this telegram.

The bail bond of the defendant was offered as an exemplar of the signature of Miller, but was refused, but taken in connection with Exhibit 7 for Identification proves the signature of Miller, and Exhibit 7 for Identification proves the receipt by J. B. Miller of Exhibit 6 for Identification, and Exhibit 6 for Identification is conclusive proof of the receipt by White of Exhibit 5 for Identification and of the understanding between Miller and White of the time of the arrival of the train in San Diego on which White should travel, for Miller met the train in accordance with the understanding arrived at by these two telegrams.

All of these exhibits as we have stated, have been transmitted to this court for examination by this court. We therefore maintain that there was no error in the court's permitting Louise Bordeau to testify concerning the contents of the telegrams received by Vida White in San Francisco and that the plaintiff in error was therefore not injured by their introduction, even if the argument of counsel for plaintiff in error is correct that the

jury were unable to efface from their memories such testimony upon the instruction of the court.

But the court struck out all testimony relative to the contents of the two telegrams testified to by Louise Bordeau, and on pages 73-74 of the transcript said: "I will strike the evidence out concerning the contents of the telegram as testified to by the witness; and I instruct you gentlemen of the jury, that you shall consider this case without considering that testimony, and shall not consider any testimony that has been stricken out." The matter was more particularly called to the jury's attention by the court's remarks previous to this ruling and the remarks of counsel for the plaintiff in error made in their hearing, as follows:

"The Court: Well, now, over the objection of the defendant, a witness was permitted to testify to the contents of a telegram in the hands of Vida White at San Francisco. What do you desire to do with that for the defendant? It was admitted on certain representations made by the United States attorney, which undoubtedly were made in good faith.

Mr. Rush: We move that that testimony of the witness Louise Bordeau, concerning and referring to a telegram, which she said she saw in the hands of Vida White, or Vida Rogers, in Sau Francisco—that all such testimony be stricken out, on the grounds stated in the objection at the time the objection was interposed to such testimony; and on the further ground that the proper foundation has not since been laid for the introduction of that testimony, and it has not been connected up with the defendant."

Counsel argues with great vehemence that "the action of the court in striking this evidence from the record did not cure the error in its admission," and quotes a number of decisions of the various states to uphold his contention, but he does not cite any authority which is binding upon this court, nor does he cite any federal cases. The true rule, and the one followed in federal courts, is that set out in Pennsylvania Company v. Roy, 102 U. S. 451, quoting from page 459:

"The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

This rule is quoted with approval in the case of Krause v. United States, 147 Fed. 442.

### See also:

Tubbs v. United States, 105 Fed. 59; Hopt v. Utah, 120 U. S. 430, 438. Therefore, following the reasoning in these cases, if there were any error on the part of the court in admitting the contents of these telegrams, and we do not admit that there was, it was cured by the instruction of the court set out on page 73 of the transcript.

In answering point three of the argument of plaintiff in error, it is only necessary to call the court's attention to the fact that in the assignment of errors filed by the plaintiff, and upon which this appeal is based, there is no error assigned in the admittance by the lower court of United States Exhibits 3 and 4, and under rule 11 of the rules of this court, this court will not now consider any alleged errors not assigned according to the rule. To be sure, the court may notice at its option any plain error, but there is no error plain or otherwise in the admittance of these two documents into the record. J. B. Miller was the only person of that name in the city of San Diego who had a charge account with the Western Union Telegraph Company. United States Exhibit 3 was the carbon copy of the bill mailed to I. B. Miller at the Victoria Apartments, San Diego, during a time when he was shown to be residing at that place, and was a regular record kept in the due course of business by the Western Union Telegraph Company at San Diego. United States Exhibit 4 was one of the records of an account kept in the due course of business by the Western Union Telegraph Company of San Diego, and shows upon its face that the bill known as United States Exhibit 3 was paid. Of course, the books of accounts of individuals or corporations kept in the due course of business are admissible in evidence, and in this case these exhibits being such records of an

account with J. B. Miller at the Victoria Apartments in San Diego, they are admissible and *prima facie* evidence of their contents, which can only be overturned by affirmative evidence, and the plaintiff in error offered no evidence relating to them in any manner whatsoever.

Points four and five of the brief of plaintiff in error have to do with the sufficiency of the evidence, it being alleged that there is not sufficient evidence in the record as it stands to sustain the verdict of the jury. This case, like all criminal cases, may be proved by circumstantial evidence, and it is not necessary that there be any direct evidence if the jury is satisfied from the facts and circumstances presented to them that the defendant was the author of the crime as charged in the indictment. On page 53 of the brief of plaintiff in error the rule is correctly stated that this court will not disturb the verdict of the jury when there is any evidence whatever to sustain the same. A careful reading of the transcript will show that there is plenty of evidence to warrant the verdict of the jury, and indeed it would be inconceivable that they would arrive at any other conclusion than that at which they did arrive, unless the circumstances proven by the Government should in some manner be explained or refuted.

The plaintiff in error was a married man [Tr. 53]. He lived with his wife from about September 28, 1915, through November, 1915, at the Victoria Apartments, 1060 Tenth street. San Diego, California. He had a charge account with the Western Union Telegraph Company at San Diego [Tr. 54], and during the month of November, 1915, the records of the Western Union

Telegraph Company at San Diego show that on November 15th he sent a telegram to White in San Francisco, costing forty-eight cents, and on November 23rd one to White in San Francisco, costing forty cents [Tr. 60]. These bills were afterwards paid [Tr. 61]. He was acquainted with Vida White, alias Vida Rogers, and visited her a number of times at 43 Washington alley, San Francisco, between July and the time that she left San Francisco and went to Tia Juana. Number 43 Washington alley was a house of prostitution. Vida Rogers, in company with Louise Bordeau, left San Francisco for Tia Juana on the day after Thanksgiving in November, 1915, and were met at the train in San Diego by plaintiff in error. Louise Bordeau stayed in San Diego over night, and Vida White went to Tia Juana where Louise Bordeau saw her the next day at The Palace, a house of prostitution. Plaintiff in error was also there. Louise Bordeau remained as an inmate of The Palace and Vida Rogers was the mistress, or landlady.

James B. Miller built The Palace and paid for it. He was often seen around there and often took his meals with the girls when he was there. He engaged Ernest Estudillo as a policeman at The Palace, or, in the common vernacular of the street, as "a bouncer," and he gave orders for his pay. He told Louise Bordeau that he owned The Palace [Tr. 45].

H. M. Stanley visited Miller at The Palace in Tia Juana and remonstrated with him regarding his running the same, and asked about certain girls who were there, whereupon Miller replied: "I will see my landlady and she may give you this information." When

Stanley suggested that he might get in trouble over this place, he replied: "Well, I am in the clear; I don't run it, but my landlady runs it for me."

We respectfully submit to the court that this brief resume of the evidence is sufficient for the jury to find that there was an understanding or agreement between Vida White and James B. Miller prior to her going to Tia Juana. That there was an agreement is certain from the fact that the plaintiff in error admitted that he owned The Palace and that Vida White ran it for him. That this agreement was prior to Vida White's going to Tia Juana is certain in that plaintiff in error knew her occupation and telegraphed to a person named White in San Francisco. Vida White received telegrams about the time those referred to in United States Exhibit 3 were sent, according to the testimony of Louise Bordeau. He met Vida White at the depot in San Diego, which circumstance undoubtedly proves an understanding between them, and the next day Vida White was installed as mistress of The Palace in Tia Juana. Therefore, we state without hesitancy that in the absence of any denial or proof on the part of plaintiff in error the jury were forced to the conclusion they reached that there was an agreement between Vida White and James B. Miller prior to her going to Tia Juana, and under the instructions of the court as set out on pages 81-83 of the transcript such an agreement constituted an inducement if there was any consideration. The statement of James B. Miller to Stanlev that the woman was his landlady is sufficient upon which to base a conclusion that such relation of employer and employe was not without the customary

remuneration. The fact that licenses were issued to Louise Bordeau and Vida Rogers, and not to Miller, is of no importance as plaintiff in error admitted that Vida White was running the place for him. Under the law of Mexico, both the inmates and landlady in a house of prostitution were required to get licenses [Tr. 46]. On the sufficiency of the evidence see

Wilson v. U. S., 190 Fed. 427 (438).

We come now to the last point argued in the brief of plaintiff in error, viz: the alleged error or errors of the court in instructing the jury. The only exception taken to the instructions of the court is that set out on page 81 of the transcript, which reads as follows:

"Mr. Rush: The defendant excepts to each and all the instructions given by the court, other than those presented or suggested by the defendant, and to each and every amendment and modification of instructions proposed by the defendant, and to the refusal to give each instruction proposed by the defendant and not given by the court."

Rule 22 of the Rules of the District Court for the Southern District of California reads as follows:

"Bills of exceptions to charge of court, when and how made.—The party excepting to the charge of the court to the jury must specify distinctly the several matters of law in the charge to which he excepts. Such matters of law, only, will be inserted in the bill of exceptions, and allowed by the court. All exceptions to the charge of the court of the jury shall be specified in writing immediately on the conclusion of the charge, and handed to the court before the jury leave the box. The

bill of exceptions must be prepared in form, and presented to the judge within ten days after verdict, and in default thereof, the exceptions will be deemed waived."

And rule 10 of the Rules of the Circuit Court of Appeals, Ninth Circuit, reads as follows:

"Bill of Exceptions. The judges of the district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

It is very apparent from reading the transcript and reading these rules that the assignments of error based on instructions given by the court should be disregarded. As stated by the Circuit Court of Appeals of the Eighth Circuit, in the case of Price v. Pankhurst, 53 Fed. 312, this rule of law is for the purpose of giving the trial court an opportunity to correct any mistakes inadvertently made in charging the jury. As heretofore stated, the transcript in this case affirmatively shows that no such action was taken by the plaintiff in error in this case. It does not appear from the transcript that the trial court's attention was particularly called to the grounds of the objections to the particular in-

structions complained of. In this respect, the court's attention is respectfully directed to the following cases:

Holder v. U. S., 150 U. S. 91;

Baggs v. Martin, 108 Fed. 33;

Ball v. U. S. 147 Fed. 32;

Price v. Pankhurst, 53 Fed. 312;

Burton v. West Jersey Ferry Co., 114 U. S. 474;

Hinchman v. First National Bank, 112 Fed. 391;

St. L., I. M. & S. R. R. Co. v. Spencer, 71 Fed. 93;

Anthony v. Railway Co., 132 U. S. 173;

Shelp v. U. S., 81 Fed. 700;

Mobile & Montgomery Ry. Co. v. Jurey, 111 U. S. 584;

McClendon v. U. S., 229 Fed. 523;

Western Union Telegraph Co. v. Baker, 85 Fed. 600.

Counsel for plaintiff in error, however, have proceeded to argue one instruction of the court on pages 61-62 of their brief, in which they claim the court erroneously stated the law. Their argument is to the same point as that on the demurrer, and our remarks on the demurrer at the beginning of this brief are a sufficient answer to the allegation that there was error in the instruction complained of, the entire point being whether or not the immoral purpose as stated in the indictment was such an immoral purpose as is contemplated by the statute. On pages 65-66 of the brief of plaintiff in error, counsel for plaintiff in error set out an instruction of the court which was given in answer to a question propounded to the court by the jury

after they had deliberated for more than two hours. The transcript does not show that any exception was taken to this instruction at the time given, but on the contrary the transcript shows on page 31 that on December 4, 1916, two weeks after the trial and verdict of the jury, counsel asked the court to note an exception to the instruction given by the jury. This is so clearly contrary to the rules as heretofore stated, governing exceptions to instructions that we do not believe that the court will entertain it for a minute. However, we believe that the instruction complained of correctly states the law, and had counsel taken an exception in due time it would have availed them nothing.

Respectfully submitted,

ALBERT SCHOONOVER,

United States Attorney;

J. Robert O'Connor,

Assistant United States Attorney;

CLYDE R. Moody,

Assistant United States Attorney,

Counsel for Defendant in Error.

IN THE

## United States Circuit Court of Appeals

For the Ninth Circuit

James B. Simpson, indicted as James B. Miller,

Plaintiff in Error,

VS.

The United States of America,  $Defendant \ in \ Error.$ 

# PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

THOMAS E. HAYDEN,

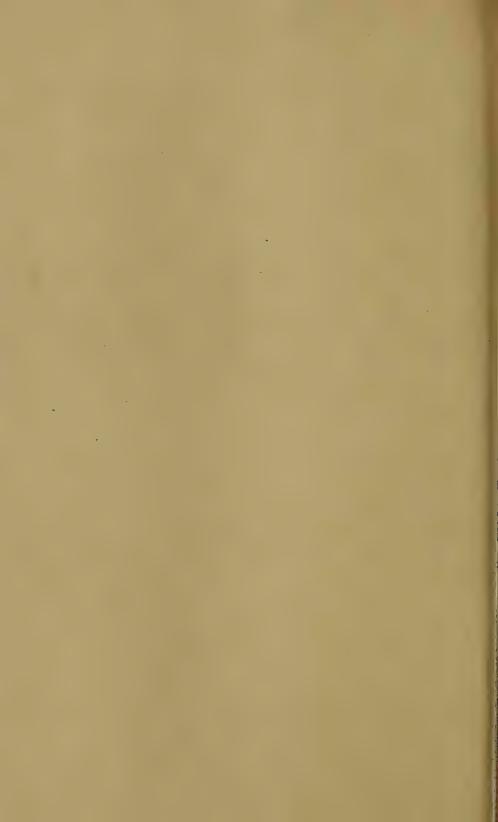
Monadnock Building, San Francisco, 2 Attorney for Plaintiff in Error and Petitioner.

F. D. Monel

Filed this......day of September, 1917.

FRANK D. MONCKTON, Clerk.

By\_\_\_\_\_\_Deputy Clerk.



IN THE

### United States Circuit Court of Appeals

For the Ninth Circuit

James B. Simpson, indicted as James B. Miller,

Plaintiff in Error,

VS.

The United States of America,

Defendant in Error.

## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

### The Case.

Defendant was indicted for an alleged violation of Section 3 of the "Mann White Slave Act".

The indictment contains two counts. The second count of the indictment charged that James B. Miller \* \* \* heretofore, to wit, on or about the 26th day of November, in the year of our Lord

one thousand nine hundred and fifteen did knowingly, unlawfully and wilfully persuade, induce and entice a certain woman, to wit, one Vida White, alias Vida Rogers, whose full and true name, other than as herein stated, is to the grand jurors unknown, to go from one place to another in foreign commerce, that is to say, to go from the City of San Francisco, State of California, to the town of Tia Juana, in the Republic of Mexico, via the Southern Pacific Company Railroad, a common carrier, from the said City of San Francisco to the City of San Diego, California, and via automobile stage, a common carrier, from the City of San Diego, California, to the Town of Tia Juana, Mexico for a certain immoral purpose, to wit, for the purpose of having said Vida White alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse.

The first count differs from the second count in that it charges that the immoral purpose of defendant was "for the purpose of placing said Vida White, alias Vida Rogers, in a house of prostitution and having her remain there in said Town of Tia Juana".

The defendant interposed a demurrer to the indictment, wherein he objected to its sufficiency upon the grounds that it failed to state facts sufficient to constitute an offense. The demurrer was overruled and defendant brought to bar upon the indictment. The jury brought in a verdict of "not

guilty" upon the first count of the indictment and a verdict of "guilty" upon the second count of the indictment, "with recommendation for leniency". That is to say, the jury found that the defendant was not guilty of enticing Vida White, alias Vida Rogers, to Tia Juana, Mexico, for the purpose of placing her in a house of prostitution and having her remain therein, but did find him guilty of enticing said Vida White, alias Vida Rogers, to Tia Juana, Mexico, for the purpose of having her manage a house of prostitution and conduct a prace wherein persons of opposite sexes meet and have illicit sexual intercourse.

### Reasons for Rehearing.

The plaintiff in error respectfully prays the court to grant him a rehearing of the above-entitled cause, upon the following grounds:

First: We earnestly contend that the evidence contained in the record of this case is wholly insufficient to support the verdict of the jury. We submit that there is absolutely no evidence that the defendant Miller persuaded or induced or enticed Vida White, alias Vida Rogers, hereinafter called Vida Rogers, to go from San Francisco to Tia Juana, or elsewhere, for the purpose of having her manage a house of prostitution, or for any other purpose. An examination of the record itself is the best argument we can advance in support of this contention.

The first witness put upon the stand by the prosecution was Louise Bordeau. While she was undoubtedly intended to be the Government's chief witness there is practically nothing of any value to the prosecution in her testimony. She testified that in the fall of 1915 she lived in San Francisco and met Vida Rogers in a house of prostitution at No. 43 Washington Alley, where witness was engaged in prostitution and where Vida Rogers was engaged as housekeeper; that the day after Thanksgiving in November, 1915, she and Vida Rogers left San Francisco for Tia Juana. Vida Rogers received two telegrams about the time she left San Francisco. The first one was received close on to three weeks before she received the second telegram which came just a few days before she left San Francisco: that the witness saw and read the telegram. She knew the defendant in this case. first met him in San Francisco when she was working at number 43 Washington Alley. Vida Rogers introduced her to him as Jim. Said Vida Rogers never made any statements to her in defendant's presence as to who he was. Witness never knew defendant under any other name than Jim and Jim Miller. He was introduced to her as Jim but Vida Rogers spoke to her about him as Jim Miller. She did not see the defendant a large number of times while she working at number 43 Washington Alley. She saw him perhaps three or four times in all while she was working there.

Witness further testified that she left San Francisco in company with Vida Rogers the first day after Thanksgiving, 1915, and went to Tia Juana by Southern Pacific train to San Diego. She went by herself from San Diego to Tia Juana, laying over in San Diego a day. When she and Vida Rogers arrived at San Diego Mr. Miller was at the train to meet them. She did not sec Miller any other time that morning but at the train. He was there just a very few minutes. He talked with Vida Rogers just a very few minutes. It was just "hello". "That is all I know." She saw Vida Rogers last on Third and Broadway when she got into an auto stage that had a sign on it that said "To Tia Juana, Mexico." She went to Tia Juana herself the next day and went to the Palace, which is a dance hall and house of prostitution. She saw Vida Rogers in the Palace. Also the defendant. She remained there from November up until after the flood. Vida Rogers was running the place; she was the landlady. When witness first went there she used to see the defendant there guite often. He staved there three or four instances that she recalled. When he was there, he ate at the restaurant for the girls connected with the Palace quite often, but she did not recall any particular statements that defendant made around the house. She did not know positively who owned the Palace, but she had heard Miller make statements that he owned it. There were twenty-two girls at the house, and four rooms in the house, and an extra house right next door to the Palace, connected with the Palace, that had twenty-two rooms in it. All the girls were engaged in prostitution. Two or three days after Vida Rogers received the first telegram she went to San Diego. She staved a couple of days and then came back. She received the other telegram just before we left. When witness first arrived in Tia Juana the house had five rooms, kitchen and dance hall, and that was the only house she saw there at that time but later another house was built in December. Witness did not remember what month it was finished. Witness was engaged in prostitution in the house and was required to get a license to do that. Vida Rogers was required to get a license to run a house of that nature. She had seen ber license. It was on the wall in the barroom. The license was made to Vida Rogers. Vida Rogers also had a license to sell liquors and tobacco, and they were in the name of Vida Rogers.

Witness also testified that when she got to San Diego she went to the San Diego Hotel. She and Vida Rogers got off the train at the Santa Fe depot and went over to the San Diego Hotel. She and Vida Rogers first went up to the Oyster Loaf together and had a bite to eat. She never left Vida Rogers at all until she got on to the auto stage. (Tr. 36-46 and 69-70.)

This is all the testimony of Louise Bordeau. An attempt was made by the prosecution to introduce testimony by Louise Bordeau as to the contents of the telegrams alleged to have been received by said

Vida Rogers in San Francisco in November, 1915, and indeed such testimony was given but at the suggestion of the court and on motion of Mr. Rush, attorney for defendant in the trial court, the court struck out the evidence concerning the contents of the telegrams as testified to by said witness and instructed the jury that it should consider the case without considering that testimony or any testimony that had been stricken out. (See pages 73-4 of Transcript.) Therefore, of course, the testimony of the witness with reference to the contents of said telegrams stands in the same position as if it had never been given.

Dave Gershon, the next witness called for the Government simply testified as to seeing Vida Rogers in Mexico, and his testimony was intended simply to show that Vida Rogers was without the jurisdiction of the court. (Tr. 47.)

The next witness called by the Government was Ernest Estudillo, whose testimony was substantially as follows:

"I know a place in Tia Juana called the Palace and know the landlady. Her name is Vida. I knew her since I went to work in the house. I knew the place before I went to work there. I was a policeman in Tia Juana and knew that the Palace was a house of prostitution. A representative of defendant hired me to go there and work as a policeman at the Palace. Mr. Miller gave an order to a fellow by the name of Tony to pay me and I received the money in pursuance of that order. I did not know who Tony was. I did not know him

until he went into that house. I guess Tony was a bartender in the Palace. He was acting like a manager there as far as I knew. I saw Miller there a good many times. In Tia Juana the one who runs a house of prostitution must have a license. I did not pay any attention to who had a license to run that house. Tony, the bartender, or the man who appeared to be the manager in the house, paid me my wages but Mr. Miller gave the order to pay the men. He told me they would pay me more wages than I was getting at the Casino." (Tr. 48-50.)

Charles H. Cousins, the next witness called for the Government, testified in substance as follows:

"I reside in San Diego and am a carpenter and builder. I know the defendant Miller and have known him about two years. I know where the Palace is in Tia Juana. I built it last year, a year ago, some time in the fall. The defendant authorized me and hired me to build the Palace. He also paid me for building it. There was a door to go from the old building to the other building. I do not know Vida Rogers or Vida White. I saw Louise Bordeau around the new place. I do not know who the proprieties of the place was. I built both the new house and the old one. the old building for Mr. Savin four or five months before I built the new building." (Tr. 50.)

H. N. Stanley, the next witness for the Government, testified in substance as follows:

"I am a police officer in San Diego and have been there about ten years. I know the Palace in Tia Juana and have known it since it opened about a year ago. I know the defendant J. B. Miller. I have seen him in Tia Juana. I saw him at the Hot Springs and at the Palace. I had a conversation with him about the Palace. Officer Whistler and myself went over there to investigate a couple of girls in the place and we met Mr. Miller. I asked him in regard to these girls, and he said, 'I will see my landlady and she will give you this information.' I believe her name was White. We consulted his landlady, in his presence, and at that time I said to him, 'You might run up against a snag, Miller, running this place', and he said, 'Well, I am in the clear, I do not run it but my landlady runs it for me.' The place is a house of prostitution.''

On cross-examination this witness testified as follows:

"I testified in this matter before the Commissioner in San Diego on the 8th day of March, this year. At that time I testified as follows: He said, 'I do not know whether this girl is in here or not. I will ask my landlady and she will be able to tell you. She does all the business for me.' I says, 'You want to watch out, Miller, or you will get in a jam with her running this place', and he says, 'I am in the clear, I am not running it, my landlady runs it.' I must have omitted 'for me' because I am positive he said 'for me'. Mr. Miller was running the Hot Springs at that time. This conversation was held in January." (Tr. 51-52.)

The testimony of Julian Eugene Cliff, next called for the Government, is to the effect that he was the manager of the Victoria Apartments in San Diego. He knew the defendant Miller. Defendant had an apartment in the Victoria Apartments. He moved in about September 28th, and had a phone in his apartment connected up with the exchange. Connection was made at either Mr. or Mrs. Miller's

request. The number of the Victoria Apartments, the office phone, was Main 3857. The number of the phone in his apartment was Main 6626. The bills were sent to the Victoria Apartments and he paid it and it was added to their bill. He believed Mr. Miller paid his telephone bill during the time he occupied the apartment. The defendant occupied a single apartment. His wife lived with him there. (Tr. 52-53.)

Arthur William Mosedale, the next witness called for the Government, testified that he was employed by the telephone company in October, 1915, and on October 11, 1915, installed a telephone in Apartment 31 of the Victoria Apartments. The number of the phone was Main 6626. (Tr. 53.)

The next witness called for the Government was F. A. Bennett, who testified in substance as follows:

"I am the manager of the Western Union Telegraph Company at San Diego. I know the defendant Miller. He had a charge account with the company in San Diego. I have the card that he opened the charge account by. It is not customary to charge telegrams in the Western Union, unless a person has opened an account. The card is not signed by Mr. Miller. I wrote the card myself at his request and in his presence. It is one of the regular records kept by my company regarding charge accounts."

The charge card was here offered in evidence by the District Attorney as United States Exhibit Number 1 over the objection of defendant's attorney. (Tr. 54.) The charge card is set forth in the transcript on page 54.

Mr. Bennett then continued his testimony as follows:

"Mr. Miller requested to open it in his name, that he was not in partnership with Mr. Couden any more. That was some time in November. I don't remember the date. I cannot tell from the card. He gave his address as the Victoria Apartments. He did not give his telephone number, that I have any record or knowledge of. I first met him in the early part of 1915."

The district attorney here showed witness a telegram which he called United States Exhibit 2 for Identification. (This is one of the telegrams, the testimony concerning which was ordered stricken from the record by the trial judge. Tr. 73-4.)

The witness further testified:

"This telegram was a part of my office records. It is a telegram received by telephone. Somebody phoned that in to be sent. In San Diego. It was filed November 15th and sent November 16th. I can tell from that record what number the telegram was phoned from. I do not know what telephone it was phoned from. I can say from the record, what the record shows, I have no personal knowledge of it, other than the record. I did not receive the telephone message myself. I know the name of the clerk that took it. I only know that from the marks on the instrument that I hold in my hand. I have no personal knowledge whatever of how the message came into the office, who sent it into the office, by whom it was received in the office, or where it was received from, except the marks I find on it, and

the marks were not made in my presence or under my personal observation or direction. In the due course of business in my company if a message is phoned in we have a special blank for copying telegrams received over the phone. On these blanks we are required to show the date, the telephone number from which it was phoned, the originating point and the destination, and the telegram is transcribed upon that blank. All these things appear to have been done, in this instance, in the telegram I hold in my hand. That is a regular record kept in the course of business of by company. I have in my possession a record showing a bill rendered to Mr. Miller in the month of November, 1915. It is a carbon copy of the bill rendered to Mr. Miller for that month. I can refer to my daily cash receipts record and tell whether that bill was paid or not."

The witness here handed the District Attorney the daily cash receipts record which was then offered for identification and marked United States Exhibit No. 4 for Identification. The District Attorney here handed the witness United States Exhibits Nos. 2, 3 and 4. Exhibit No. 2 is the telegram ordered stricken from the records by the judge, as hereinabove stated, and Exhibits Nos. 3 and 4 are set forth in full on pages 60 and 61 of the Transcript, Exhibit No. 3 being a bill for telegram sent to Miller during the month of November, 1915, and Exhibit 4 being the daily cash record of the Western Union Telegraph Company.

The witness was then asked by the District Attorney whether or not he could tell from said records whether the telegram known as United States Ex-

hibit No. 2 was charged to Mr. Miller's account and whether the same was paid for or not. Defendant's attorney objected to this as incompetent, irrelevant and immaterial and no proper foundation laid, and hearsay. His objection was overruled. In support of his objection attorney for defendant elicited testimony from the witness as follows:

"Those matters offered in evidence, that carbon copy of that bill, was made by some other employee in the company. I did not make the charge on the books. All I know about it is simply what I find in the records. Personally, I didn't have anything to do with it. As far as I know the records are accurate; there is a slight chance that they may not be."

In answer to a question of the court as to what position the witness held in the company, the witness testified:

"I am the manager, the highest officer of the office. These records are kept under my supervision. We have a standard routine how they shall be kept. If these records were incorrect from November down I would have ascertained by this time whether or not they were correct. It is my opinion that they are correct. I have examined them. They are regular routine records. There are hundreds such records in the office. They are ordinarily kept correctly. I do not find very many mistakes in them."

#### Witness further testified:

"This record, with reference to the cash, where it recites 'J. B. Miller', is written on the line and in some handwriting which is not mine, which indicates that a bill charged against J. B. Miller for the amount of two dollars and

some cents has been paid. I do not know anything about who paid that bill and I can('t) tell from my record who paid it. There is nothing from my record that shows who the bill was presented to. I don't know anything about who it was presented to. We had no other J. B. Miller on our charge account at that time. The defendant was the man who had the account on our books by the name of J. B. Miller.

"United States Exhibit No. 2 for Identification (the telegram stricken from the record as hereinabove stated), is in all particulars as required by the rules of my company relative to those matters that I testified to, concerning taking the name of the party over the phone, the number, and to whom the account was to be charged. It is one of the regular original telegrams as filed in our office in San Diego. A former employee in our office received that telegram, one Harrington Shaw. The last I heard of him he was in El Paso, Texas. He is the man who wrote out what is in this record of the receipt of the telegram. The bookkeeper that wrote the bill, her name is Miss Stetzel. She compiled the bill from the telegrams, and the other record was written by Miss Naylor, the cashier, who accounts for all the cash. The bookkeeper made that '48' on the corner of the telegram. The '48' on the telegram and the '48' on the bill are identical. That is, the bill was made up from this telegram. That is the amount of money that is due for it. The charge is always entered on the telegram and then transferred to the books. The date, the party addressed, the destination, and th sender's name, Mr. Miller, and the fact is marked 'Charged' over here in this corner, indicate that the telegram is chargeable to J. B. Miller, as indicated in this book."

Myrl Stetzel, the next witness called for the Government, testified in substance as follows:

"I am a clerk for the Western Union and was such in November, 1915. The document shown me, which has been used in evidence as United States Exhibit No. 3, I recognize. It is mine. I made that out myself. It is a bill for telegrams for the month of November. It is a carbon copy. It is in my handwriting. The original was mailed and addressed to J. B. Miller, Victoria Apartments. I made this bill out from the telegrams on file in the office. It was made out last year. The document does not show what year it was made out. The date was on the original bill but was not copied on the copy. The words 'To White' is the party that the telegram is going to, and San Francisco is the city to where it was going. The figures on the right, '48', is the amount of money that was charged for sending the telegram. The next item is on the 19th, to McMann, San Francisco, forty cents. The next was Mahon, San Francisco, 1.21, on the 20th and 21st. The next on the 23rd, to White, San Francisco, forty cents. That may have been either a telegram or a night letter. That charge on the bill is for the tax, one cent on every telegram, a war tax. I do not know what that other business is down here; I didn't put it there. I did not put any other figures except what I have read.

The COURT. Has that telegram got anything to do with the copy of the paper you have in

your hand?

A. This is the 15th; that is the first telegram on there. I made that entry from this document. The '48' is in my figures. I made that charge from this paper, probably the next day, I will say the next day after it bears date, on November 15th. I mailed out the original and mailed that to this address.

The account is accurate and correct. The carbon copy I hold in my hand is simply a copy of that part of the bill as rendered. There was other printed matter on the bill that was rendered that does not appear on this carbon copy. The bill that was rendered had a date on it. When I made up this bill I made it up from the telegram, what purports to be a telegram

that I hold in my hand.

Q. (By attorney for defendant). You don't know anything about where that telegram came from? You just found it among the files of the office, and following your usual course of business you made that bill from the information that was contained on that telegram, or purported telegram? May I see that just a moment? This instrument I refer to as a telegram is the one that has been marked 'United States Exhibit No. 2 for Identity' only. Now, where that came from you don't know, other than that you found it in the records of your office?

A. That is all.

Q. You don't know who wrote it, or how it got into the office?

A. Well, it was taken over the phone.

Q. What is that?

A. Is that what you want to know.

Q. I am asking you, do you know of your own knowledge—

A. No.

Q. All the knowledge you have of it is what you found on the bill itself; that is what I mean

A. That is all I have to do with it. (Witness continuing). I did not talk with anybody about it, or no one told me anything about it. And the charge I made, so many cents, is the charge indicated on the telegram itself. I have no personal information from any other source whatsoever as to the amount of the charge or

when it was made or anything else except what I got from the telegram that I found in the files of the office and that telegram according to the rules of my office indicates that it was telephoned into the office. The telegram is in the handwriting of II. S. Shaw, one of the clerks. As to the telegram, or purported telegram, shown to me, called United States Exhibit No. 5 for Identification, in other words, I took from the document the entries which I have in the bill which has been introduced in evidence as United States Exhibit No. 3. I listed this telegram from this bill. The rate on the telegram is the same as the rate on the bill.

Q. (By the District Attorney). Will you show me on the bill where you have listed that tele-

gram

A. (Indicating). '11/23 White, San Francisco, 40 cents', and this U. S. Exhibit No. 5 for Identification was a part of the files of the office at that time."

The next witness called for the Government was Etta Naylor, who testified as follows:

"I was acting as cashier for the Western Union at San Diego during November and December, 1915. The document shown me, being U. S. Exhibit No. 4 (that is the daily cash record appearing at page 61 of the Transcript), was our cash register for December 9th. It is in my handwriting.

Q. I will show you a carbon copy of a bill which has been introduced in evidence as United States Exhibit No. 3 and ask you if you can show from the Exhibit No. 4 whether or not the Exhibit No. 3, the bill, has been paid?

A. Yes, sir, that is in my handwriting and

it pays this bill.

(Witness continuing). I have no memory, independent of that, about the payment of that

bill. Plaintiff's Exhibit No. 4 is kept correctly. I keep it, it is balanced daily. It is a correct statement of the receipts on that day. I can tell from looking at this daily cash register item that the other item here, \$2.53, appears upon that item upon that account, the daily cash register. It is here. It is the same item. I know this because the November bills are always paid in December. It corresponds exactly with the bill, and it was received the following month, and the amount is the same 2.53 on both the bill and on the cash register. The accounts are generally correct. I did not write the few words written with a lead pencil at the bottom of the bill."

#### On cross-examination the witness testified:

"I have no independent recollection of the payment of that bill. "All that I know about it is that I found it in the records kept by me, and the record shows it was paid. I assume that the 2.53 is the amount of the bill for the month before because it is the same amount. If another individual, or the same individual, paid the same amount for some other purpose, it would appear on my cash just the same. I do not know who paid that bill, and I have no knowledge of how it was paid. I haven't any idea whether it was paid by cash or by check, or by what individual. I don't know how the bill went out to the person who paid it, if it ever did go out, because I do not handle that part of the work. All I know is what the record shows, and the record shows that on December 9th J. B. Miller is credited with eash 2.53."

Mr. F. A. Bennett was then recalled on behalf of the Government, and testified as follows:

"Q. I will show you a document which has been introduced as United States Exhibit No. 5

for Identification, and ask you if you know what it is.

Mr. Rush. I object to that as calling for a conclusion of the witness, and incompetent, irrelevant and immaterial.

The Court. Do not state the contents of it. Q. (By Mr. Moody). Do you know what it is?

A. It is a telegram. (Witness continuing.) I got it out of our office files at San Diego. It is the original record. It bears sending marks. It would not bear those marks if it were not sent.

Q. I will show you a record which I will designate as U. S. Exhibit No. 6 for Identification and ask you if you know what it is.

A. A copy of a telegram. It is a record of our office in San Diego and is a copy of a received message. It was received November 26, 1915. It is a carbon copy of the original message made at the time the original was received. I have a record with me showing whether or not the telegram, or the original of which this is a carbon copy, was delivered in San Diego."

Witness here hands Mr. Moody a document which is marked for identification as No. 7.

Q. (Mr. Moody). "Now, this No. 7 for Identification, is what, Mr. Bennett?

A. It is a delivery sheet for November 26th. It shows the delivery of telegram 451 in San Diego."

United States Exhibit No. 7, together with the bond as an exemplar of the signature of the defendant, was then offered in evidence by the District Attorney, was objected to by the attorney for the defendant, and the objection was sustained. The District Attorney then stated:

"At this time we desire to offer all the telegrams, United States Exhibits Nos. 5 and 2 for Identification, and offer them as exhibits at this time.

Mr. Rush (attorney for defendant). The defendant objects to the offer of those instruments, and each of them, on the ground that they are incompetent, irrelevant and immaterial, that no proper foundation has been laid for their introduction, and that they are not the best evidence, and they are hearsay.

The Court. The objection will be sustained. Mr. Moody. That is all, Mr. Bennett. The

Government rests."

#### Then the following proceedings occurred:

"The Court. Well, now, over the objection of the defendant, a witness was permitted to testify to the contents of a telegram in the hands of Vida White at San Francisco. What do you desire to do with that for the defendant? It was admitted on certain representations made by the United States Attorney, which undoubtedly were made in good faith.

Mr. Rush (attorney for defendant). We move that that testimony of the witness Louise Bordeau, concerning and referring to a telegram which she said she saw in the hands of Vida White or Vida Rogers in San Francisco—that all such testimony be stricken out on the grounds stated in the objection at the time the objection was interposed to such testimony; and on the further ground that the proper foundation has not since been laid for the introduction of that testimony, and it has not been connected up with the defendant.

The Court. I will strike the evidence out concerning the contents of the telegram, as testified to by the witness; and I instruct you, gentlemen of the jury, that you shall consider

this case without considering that testimony, and shall not consider any testimony that has been stricken out.

Mr. Rush. May it please the Court, the defendant at this time moves the Court to instruct the jury to find a verdict of not guilty, on the ground that there is not sufficient evidence to sustain a conviction for this offense upon this charge, or either count of it.

The Court. The motion will be denied.

Mr. Rush. We rest."

I feel it necessary at this point to apolgize for the great length of this brief, and wish to assure the court that I inserted the evidence herein as fully as I have in an effort to relieve the court of the necessity of constantly referring to the transcript in passing upon my contention that there is no evidence in the record to support the verdict of the jury in this case.

All that is proven by the testimony of Louise Bordeau is that in November, 1915, she was engaged in prostitution in San Francisco in a house of prostitution over which Vida Rogers presided as housekeeper or landlady. That she there met the defendant three or four times, and he was introduced to her by Vida Rogers as Jim. That in November, 1915, Vida Rogers received two telegrams. All testimony as to the contents of these telegrams was stricken from the record, and therefore, as far as Louise Bordeau's testimony is concerned, at least, there is simply the bald fact that Vida Rogers received two telegrams. There is not a word to show whence the telegrams came, who

wrote them, or what they contained. There is an absolute failure to connect those telegrams with the defendant in the case, and, there is not a single scrap of testimony anywhere in the records as to what the contents of those telegrams was. For aught that appears of record those telegrams might have been sent to the Rogers women by anyone. Indeed it is a matter of small moment to this case who sent them, as there is no evidence as to what their contents were. They might have contained matters totally unrelated to the matters in issue herein, and it is certain, as far as the record is concerned, and it is with the record alone we are concerned, the witness's testimony as to these two telegrams is of no more value than if she had testified that two blank pieces of paper had been wafted in through an open window, from nowhere, from nobody, and containing no message.

The learned district attorney has inserted in his brief (pages 19-20-21-22) the contents of certain documents which were refused admittance in evidence in the trial court. These documents purported to give the contents of certain telegrams purporting to have passed between someone at telephone number Main 6626 in San Diego and one Miss Lydia White at San Francisco. As they were denied admission in the court below they certainly have no place in the record of this court, either in the transcript of testimony, where they are not found, or in the brief of the district attorney, where they are found.

The witness Louise Bordeau further testified that after receiving the two telegrams she and Vida Rogers went to San Diego; that defendant met them at the train where he "talked" with Vida Rogers. It was just "hello". That she did not see defendant any more that morning. She also testified that she never left Vida Rogers at all that day until Vida Rogers got on the auto stage to Tia Juana. That she went to Tia Juana herself the next day and stayed at the Palace, a house of prostitution, where she saw defendant quite often; that she did not know positively who owned the Palace, but had heard defendant makes statements that he owned it.

Your Honors will notice that there is not a word of evidence connecting the departure of Vida Rogers from San Francisco to Tia Juana with the receipt of the two telegrams in November. No statement of Vida Rogers, either in San Francisco or later in Tia Juana, connects defendant with her coming to Tia Juana. There is no direct evidence to the effect that defendant was the owner of the Palace. Only loose statements by a couple of witnesses as to statements alleged to have been made by defendant. Counter to this is the fact that the license to conduct this house of prostitution was issued in the name of Vida Rogers. But even if he was the owner that is no evidence that he induced or enticed Vida Rogers to manage it for him. Running a house of prostitution is a detestable and contemptible business, but it does not prove him guilty of the crime charged here—nor does it operate to bar

him from the benefit of the legal presumptions and rules of law obviously applicable here.

The receipt of two blank telegrams—from nobody—from nowhere—taking a train to San Diego—meeting defendant at the train and saying "hello" to him, and afterwards appearing as landlady in the Palace at Tia Juana, seems to me to fall very far short of the proof required to convict the defendant in this case of wilfully persuading, inducing, or enticing Vida Rogers to go from San Francisco to Tia Juana for the purpose of having her manage a house of prostitution for him.

The case at bar seems to me to be even weaker in the matter of proof than the case of Johnson v. U. S., reported in 215 Fed. 679-82. In this case the defendant was indicted and convicted upon several counts, one of the counts charging him with placing the complaining witness in a house of prostitution. The conviction on this count was reversed, the court saying:

"Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girls arrived in Chicago defendant supplied the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that when providing transportation he had the intention to aid her subsequently in her profession. But criminal convictions cannot be allowed to rest on suspicion."

Confining ourselves to the record, as we must of necessity, I earnestly assert that it does not develop

sufficient evidence upon which to base even a fair suspicion of defendant's guilt of the crime charged. The jury on the same evidence might just as happily have brought in a verdict convicting him of the crime of persuading Louise Bordeau of entering a house of prostitution. He furnished no money—there is no evidence of any agreement between defendant and Vida Rogers—no conversations, letters, or telegrams—absolutely nothing but the fact that she did come to Tia Juana from San Francisco, and upon her arrival did manage a house of prostitution, the license for which was issued in her name, and was hung by her on the wall in the bar-room. (Tr. 46.)

The learned judge of this court who wrote the opinion as to which we are now asking a rehearing, in speaking of the sufficiency of the evidence referred to two telegrams shown by the records of the Western Union Company at San Diego to have been sent to one White at San Francisco on November 15th and November 23rd, respectively. In this connection we respectfully suggest that as all telegrams alleged to have been received or sent by Vida White were stricken from the record: the proof offered as preliminary to the admission of any telegrams is absolutely foreign to the record. The admission of these records of the Western Union Company was strongly and consistently objected to by defendant, and their admission over such objections was assigned as error, and I hereinafter urge it is a separate and further reason for a rehearing herein.

Second. The second ground upon which we seek a rehearing is that the acts charged in the second count do not come within the scope of the "White Slave Act". Inducing a woman to go from one place to another in interstate or foreign commerce for the purpose of managing a house of prostitution does not fall within any of the immoral purposes prohibited by that act. In the opinion of the learned judges of the Circuit Court of Appeals herein, confirming the conviction in this matter, the following language appears:

"It is to be conceded that under the rule of ejus dem generis the phrase 'other immorality' implies sexual immorality, but it would be too rigorous an application of this rule to limit the phrase to the personal sexual immorality of the woman herself."

We hope to be able to induce this court to change its views in this regard. It being conceded in the court's opinion that "other immorality" implies sexual immorality, we believe that the court's opinion that it would be "too rigorous an application of this rule to limit the phrase to personal sexual immorality of the woman herself," cannot, upon closer examination, be sustained. Sexual immorality is, of necessity, a personal immorality. One cannot be sexually immoral, once removed, so to speak. The manager of a house of prostitution, no doubt, is immoral regardless of the fact as to whether or not she is sexually immoral, but the immorality

involved in managing a brothel is an entirely distinct and separate kind of immorality. It is not difficult to conceive of a person being sexually immoral, and yet being otherwise-possessed of all the virtues which go to make the character of an honest and likeable man. Not so with the immorality involved in the management of a brothel. It is a cold, cruel and sinister profession, and the immorality involved has nothing in common with the immorality comprehended within the words "sexual immorality." The two kinds of immorality are as far apart as the poles and as far apart as the passions in which they are conceived. The one the child of perverted passion, the other the offspring of cold, cruel and calculating greed. The one immoral, the other unmoral.

The Orientals placed the management of their harems in the hands of eunuchs. Could they by any possible stretch of the imagination be characterized as being sexually immoral?

Would a female physician regularly retained to serve such a house be, from the mere fact of being in such a service, "sexually immoral"; and would her importation from San Francisco to Tia Juana for such a purpose be a violation of the White Slave Act? The same question is pertinent with reference to chambermaids and others employed in and around such a place, in capacities other than as prostitutes.

There is no question in this case of prostitution. The defendant by the first count of the indictment was charged with placing Vida Rogers in a house of prostitution, and of this charge he was declared not guilty by the verdict of the jury. The case, then, must stand or fall on the immorality involved in *managing* a house of prostitution.

We have examined all the reported cases dealing with the violation of the "White Slave Act" and have found none dealing with anything but the personal sexual immorality of the "slave" involved.

This court in its opinion herein says that there is nothing in the case of Suslak v. U. S., 213 Fed. 913, which is inconsistent with the opinion of the court that the law ought not to be limited to cases of personal sexual immorality of the woman herself. In that case the court says:

"Whether the woman be pure or impure, if her transportation be for the purpose of sexual immorality, the statute is violated. Such a meaning, it is thought, both the spirit and the purpose of the statute imply."

There is also a definition of "prostitution" and "debauchery" as used in this statute, all of which seem to be fairly pregnant with the idea that the statute deals with "personal sexual immorality" rather than the management of it.

We respectfully submit that the Athanesaw case, 227 U. S. 326, does not support the construction placed upon the act by this court. In that case the charge made was that defendant therein had induced the girl involved to travel from one state to another for the purpose of "debauchery". Defend-

ants in that case were not charged with placing the girl in a low dance hall or theatre, but were charged with importing her for the purpose of "debauchery".

In the case at bar the charge is not the inducement of Vida White for purposes of prostitution or debauchery, but for the purpose of making her the manager of a house of prostitution. And therein lies the distinction between the two cases. Had they charged "debauchery" in the case at bar it would probably have met the same fate as the count containing the "prostitution charge"—in a verdict of not guilty. You cannot charge a man with "engaging a woman to manage a house of prostitution", and convict him of "debauchery", and we apprehend that had the indictment in the Athanesaw case charged that the purpose of the induucement was to "place the girl in a dance hall" it would not come within the "White Slave Act". Further, to this point, in its opinion herein the court says:

"For one having a house of prostitution in Mexico to induce a woman to go there to become the *efficient means* for what is perhaps the most offensive form of the evil against which the statute is expressly directed, would admittedly be violative of the letter and, as we think, clearly contrary to the spirit of the statute."

It is true that the intent of the act is to stamp out the white slave traffic, but in our opinion both the letter and spirit of the act treat only of the traffic in "white slaves"—that is to say, the traffic in girls designed to be used in prostitution, debauchery, or any other immoral practices.

And the other immoral practices with which the act deals under the doctrine of ejus dem generis means the other and even lower forms of perversion which exist as a by-product of such places. The statute was meant to deal with the importation of "slaves" and not with the importation of their masters and mistresses; with the importation of the victims of the evil and not with the efficient means for maintaining the evil.

Surely if Congress had intended to include in the prohibitions of the statute the transportation from state to state of the masters and mistresses of the "slave traffic", it would not have left the inclusion of the master slave as a vague and indefinite generality following upon the express and clear designation of their victims.

Third. Our third point is that the verdict of the jury and judgment of the court should be reversed because of the introduction in evidence of secondary evidence of the contents of the two telegrams alleged to have been received by Vida Rogers from the defendant on November 15th and on November 23, 1915. In its opinion herein the court concedes that this evidence was improvidently received and states that the only question now is whether under all the circumstances of the case its reception constitutes reversible error. In view of the fact that outside of these two telegrams, and charge accounts.

telephone numbers and bills connected therewith, the admission of which were objected to by counsel for defendant, and form our fourth reason for asking for a rehearing herein and which will be immediately hereafter taken up, we believe their admission was fatally prejudicial to the rights of the defendant in this action. The condition of the record and the evidence without these telegrams leads inevitably to the conclusion that the defendant was convicted by the jury upon the strength of these telegrams and upon nothing else.

In treating of this error of the trial court the court in its opinion herein says:

"It was upon the court's own motion that the testimony was received subject to a motion to strike it out later on, and to this course no objection was raised by the defendant."

In this the court is mistaken as an examination of the record will disclose. The matter is treated as follows in the record:

"Q. (By district attorney). I will exhibit to you a telegram which I will call United States Exhibit 1 for Identification and I will ask you if that is the wording of the telegram that you say that this woman received?

Mr. Rush (attorney for defendant). Just a moment. I object to that question as incompetent, irrelevant and immaterial." (Tr. 36.)

After this there was some discussion between the court and the district attorney, at the end of which Mr. Rush, attorney for defendant, said:

"I want to add to my objection the further ground that it calls for hearsay." (Tr. 37.)

Some further discussion followed and then the district attorney offered to withdraw not the telegrams but the witness. Then the following occurred:

"The COURT. Well, I will not require you to withdraw her. Upon your representation that you expect to do it, I will permit the evidence, and I will strike it out if you fail to

produce the evidence.

Mr. Rush (attorney for defendant). Your Honor, before your Honor rules will you permit me to just suggest one matter, and that is this: I do it because I don't think your Honor apprehends the point of my objection. Before it can be shown that a telegram was received in San Francisco by this woman, or by anyone, it must be shown a telegram was sent, it must be proven it was sent by this defendant. show this woman a writing, or what purports to be a copy—not the thing that she saw there. but something containing the same language that she saw there—and ask her to refresh her memory from that, and say that that is the same language that was in the telegram that she saw in San Francisco, in any event would not be competent. She can only refresh her recollection from memoranda that she made berself. She cannot refresh her recollection from memoranda made by some one else, and which she, herself, did not see made, and never saw before this time. This, at the most, would be simply a memorandum of what the operator in the town from which it was sent, sent, and is not the identical object that she saw." (Tr. 38-39.)

Then followed discussion between Mr. Moody and the court and some questions of the witness Louise Bordeau, and then next came the question "What was the substance of it (the telegram)?"

"Mr. Rush (attorney for defendant). We object to that as incompetent, irrelevant and immaterial, and no proper foundation laid, and

hearsay.

The Court. Well, on the promise of the United States Attorney that they will show that the recipient of the telegram is not in the jurisdiction of the court, the objection will be overruled.

Q. (By the court). Now, did this woman keep the telegram after you saw it? Was it in her possession the last time you saw it?

A. Yes, your Honor.

Q. Well, answer the question.

Mr. Rush (attorney for defendant). We except to the ruling of the court. I understand—the court will pardon me if I inquire, in this court, do we have to enter an exception to the ruling if we desire it, or does the rule that applies in the state court apply here now?

The Court. You can have a stipulation on that subject, if you desire it, to have an excep-

tion entered.

Mr. Rush. Will you stipulate that any time we object, we need not enter an exception, but that the exception may be presumed to have been preserved and entered, without going through the necessity in each instance?

Mr. Moody. I will so stipulate—in order to expedite the case—I will stipulate an exception may be deemed taken to all rulings." (Tr.

41-42.)

As to the other telegram received the defendant in a like manner objected and preserved an exception to the admission of its contents. (Tr. 43.) The rights of the defendant, as the court will observe from these excerpts of the record, were preserved both by objection and exception, and by stipulation between the District Attorney and the attorney for the defendant. All that can be reasonably expected of counsel for the defendant, and all that counsel for defendant could with propriety interpose were the objections and exceptions made and taken.

As to the fact that when the testimony was subsequently stricken out by the court there was no request that a stronger admonition be given to the jury, or that other means be adopted for the protection of the defendant against possible prejudice, we can only say that the charge of the court in this regard was sufficient in all respects, as far as form was concerned, and we question whether counsel for defendant could have possibly asked for any other instructions than the instructions given, that

"the jury should consider the case without considering that testimony, and should not consider any testimony that has been stricken out".

At any rate, the damage was done. In our opinion no instructions, however complete and specific, would have sufficed to repair the injury done the rights of defendant by the prejudicial admission of these two telegrams in evidence. The condition of the record leaves no doubt in our minds that these telegrams were the cause of defendant's conviction, and as a matter of fact and common knowledge we know that it is practically impossible to take such

matters from the consideration of the jury by any admonition or instruction.

I think what we have shown above ought to relieve the attorney for the defendant in this matter in the trial court from the suggestion that the incident of the introduction of these telegrams in evidence was treated *casually* by him, at least. We question whether he could have gone further and still maintain the proper respect for the ruling of the court that should be the aim of all officers of the court.

Fourth. Finally we ask this court to grant us a rehearing upon the ground that the lower court erred in admitting in evidence two exhibits offered by the Government, involving the records of the telegraph company at San Diego. (Tr. 60-61.) In regard to these two exhibits the court in its opinion herein was laboring under the impression that no objection was offered to their reception in evidence, the court saying:

"Although no objections were made or exceptions taken to the reception of two exhibits offered by the government involving the records of the telegraph company \* \* \* in the absence of objection to the introduction of the exhibits we would not be warranted in setting aside the verdict for a defect which might very easily have been cured, had the defendant raised an objection at the time."

The record, however, does show that the defendant did offer vigorous and persistent objection, and therefore we ask this honorable court for a rehearing so that the defendant may be given the full benefit of his objections as shown by the record. We respectfully call the court's attention to the condition of the record in this respect. At page fifty-seven of the transcript the following appears:

"Mr. Moody. I will offer the bill and the daily cash receipts in evidence, before I offer

the telegrams—that is 3 and 4.

Mr. Rush. To each of them we object on the ground that they are incompetent, irrelevant and immaterial and not the best evidence and hearsay. Before the court rules I would like to ask the witness a few questions.

The Court. All right, proceed.

Mr. Rush. Mr. Bennett, those matters that you offered, for instance, that carbon copy of that bill, did you make that copy yourself?

Answer. No, sir. It was made by some other employee of the company. I did not make the charge on the books. All I know about it is simply what I find in the records. Personally, I didn't have anything to do with it. As far as I know the records are accurate; there is a slight chance that they may not be.

Mr. Rush. We submit the objection.

The court here asked the witness a few questions, and then said—I will overrule the objection.

Mr. Rush. Your Honor, may I ask just one

question?

The Court. Yes, sir.

Mr. Rush. This record with reference to the eash, where it recites, 'J. B. Miller,' is written on the line there in some handwriting which I take it is not yours?

A. No, sir. Q. Which indicates that a bill charged against J. B. Miller for the amount of two dollars and some cents has been paid?

A. Yes, sir. I do not know anything about who paid that bill, and I can('t) tell from my record who paid it. There is nothing from my record which shows who the bill was presented to. I do not know anything about who it was presented to.

Mr. Rush. I submit the objection.

Q. (Mr. Moody). Did you have any other J. B. Miller on your charge account at that time?

A. No, sir.

Q. (By the court). The defendant was the man who had the account on your books by the name of J. B. Miller?

A. Yes. sir.

The Court. Objection overruled.

Mr. Rush. Exception."

The introduction of the disputed evidence follows immediately after this, appearing on pages sixty and sixty-one of the transcript.

The record leaves no question but that the defendant objected early and often to the introduction of this evidence, and that both the district attorney and the judge of the trial court each took a hand in questioning the witness in an effort to meet the defedant's objections.

In addition we wish most earnestly to urge that as the telegrams with which these records are concerned were ruled out of evidence, the attempted preliminary proof of their authorship should share the same fate automatically. The mere sending of a telegram, the contents of which is unknown, cannot, we submit, have any probative force whatever. For aught that appears of record these telegrams might have related to matters absolutely foreign to the matters involved in this case. To assume that

these telegrams contained matters which would connect defendant criminally with the crime charged herein, would, it seems to us, have the effect of depriving the defendant of the well-founded presumption that a man is innocent until he is proven guilty. This is an important matter in this case as this court has referred to the fact that these records show that defendant was in telegraphic communication with Vida White, or Rogers, as one of the substantial items of evidence which showed the defendant's guilt of the crime charged.

We respectfully pray the court to grant the plaintiff in error a rehearing in the above-entitled cause.

Dated, San Francisco, September 4, 1917.

THOMAS E. HAYDEN,
Attorney for Plaintiff in Error
and Petitioner.

#### CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

THOMAS E. HAYDEN,

Counsel for Plaintiff in Error

and Petitioner.

#### United States

## Circuit Court of Appeals

For the Ninth Circuit.

MOK NUEY TAU, by MOK JOCK,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

## Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.





### United States

## Circuit Court of Appeals

For the Ninth Circuit.

MOK NUEY TAU, by MOK JOCK,

Appellant,

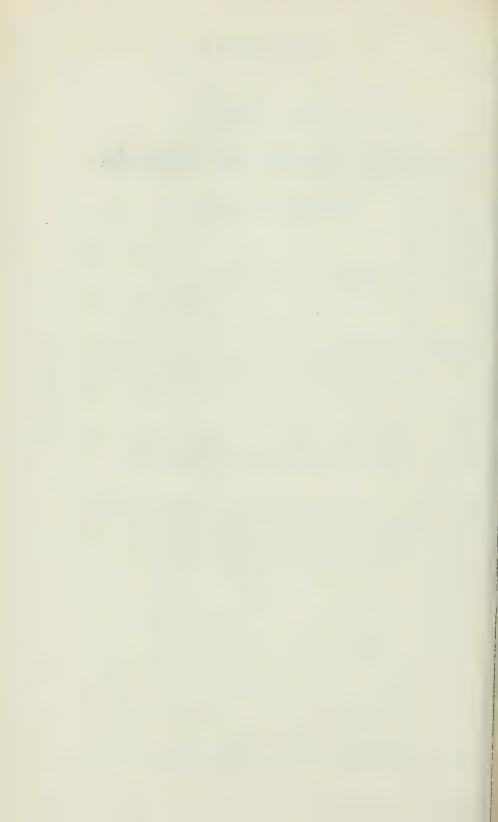
VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

# Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Appearance Bond	20
Assignment of Errors	15
Attorneys, Names and Addresses of	1
Bond, Appearance	20
Certificate of Clerk U.S. District Court to Orig-	
inal Exhibits	29
Certificate of Clerk U.S. District Court to	
Transcript on Appeal	27
Citation on Appeal—Copy	19
Citation on Appeal—Original	28
Demurrer to Petition for Writ of Habeas Cor-	
pus	11
Minutes of Hearing on Order to Show Cause	10
Names and Addresses of Attorneys	1
Notice of Appeal	13
Order Allowing Petition for Appeal and Re-	
leasing on Bond	18
Order Extending Time to Docket Case	24
Order Extending Time to Docket Case	25
Order Extending Time to Docket Case	26
Order Respecting Withdrawal of Immigration	
Record	23
Order Sustaining Demurrer to and Denying	
Petition for a Writ of Habeas Corpus	12
Order to Show Cause	9

Index.	Page
Petition for Appeal	. 14
Petition for Writ	. 3
Praecipe for Transcript on Appeal	. 1
Stipulation and Order Respecting Withdrawa	ıl
of Immigration Record	. 22

In the Southern Division of the District Court of the United States, Northern District of California, First Division.

### No. 16,104.

In the Matter of MOK NUEY TAU, on Habeas Corpus.

### Names and Addresses of Attorneys.

- For the Detained: GEO. A. McGOWAN, Esq., San Francisco, Cal.
- For the Respondent: U. S. ATTORNEY, San Francisco, Cal.
- District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

### No. 16,104.

In the Matter of the Application of MOK NUEY TAU, on Habeas Corpus.

### Praecipe for Transcript on Appeal.

To the Clerk of the Said Court:

Sir: Please make up Transcript of Appeal in the above-entitled case, to be composed of the following papers, to wit:

- 1. Petition for Writ of Habeas Corpus.
- 2. Order to Show Cause.
- 3. Demurrer to Petition.
- 4. Minute Order Regarding Immigration Record.
- 5. Judgment and Order Dismissing Order to Show Cause and Denying Petition for Writ.

- 6. Notice of Appeal.
- 7. Petition for Appeal.
- 8. Assignment of Errors.
- 9. Order Allowing Appeal and Releasing on Bond.
  - 10. Citations on Appeal—Original and Copy.
  - 11. Order Extending Time to Docket Case.
- 12. Stipulation and Order Regarding Immigration Record.
  - 13. Appearance Bond.
  - 14. Clerk's Certificate.

### GEO. A. McGOWAN,

Attorney for Petitioner. [1\*]

Due service and receipt of a copy of the within praccipe is hereby admitted this 15th day of January, 1917.

### JNO. W. PRESTON,

U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

In the District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,104.

In the Matter of MOK NUEY TAU, on Habeas Corpus.

<sup>\*</sup>Page-number appearing at foot of page of original certified Transcript of Record.

### Petition for Writ.

To the Honorable M. T. DOOLING, United States District Judge, in and for the Northern District of California, Now Presiding in the Above-entitled Court:

It is respectfully shown by the petition of Mok Jack:

That Mok Nuey Tau, hereinafter referred to as the detained, is unlawfully imprisoned, detained, confined and restrained of his liberty under the order of and by the direction of the Secretary of the Department of Labor by Edward White, Commissioner of Immigration for the Port of San Francisco at the Immigration Station at Angel Island, County of Marin, or at some other place within the State and Northern District of California, Southern Division thereof. That the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimd by the said Secretary and the said Commissioner that the detained is an alien Chinese person who has been found within the United States in violation of the provisions of a law of the United States, to wit, the Chinese Exclusion or Restriction Laws or Acts, and that he was therefore subject to be taken into custody and returned to the country whence he came under section 21 of the Immigration Act approved February 20, 1907.

That the said Commissioner now holds the said detained in [3] custody under a warrant of deportation of the said Secretary of Labor, within the

State and Northern District of California, Southern Division thereof, and it is the purpose and intention of the said Commissioner to execute the said warrant of deportation by causing the detained to be deported upon the SS. "China," sailing from the port of San Francisco, at 1:00 o'clock P. M. on October 10, 1916, and unless this Court intervene the said detained will be carried away from his domicile within the United States, and deprived of his rights, as in this petition hereinafter expressly set forth.

Your petitoner alleges that the detained does not come within the restrictions or provisions of said Immigration Act. But on the contrary your petitioner alleges that the finding of said Secretary of Labor that the detained violated the Chinese Exclusion and Restriction Acts by presenting what the Secretary claims to be fraudulent proof of his said exempt status, is in excess of the jurisdiction, powers and authority of the said Secretary, and particularly is in violation of the Chinese Exclusion and Restriction Acts, which said acts provide that Chinese persons found unlawfully within the United States shall be arrested and accorded a trial before a United States Justice, Judge or Commissioner; and that the said Secretary of Labor is not one of the judicial officers enumerated in said acts as having authority to determine the question of the legality or illegality of the residence of a Chinese person charged with being illegally within the United States: Your petitioner further alleges that the action of the said Secretary of Labor in

assuming jurisdiction over the said detained and in issuing said warrant of deportation acted in violation of the provisions of section 43 of the said General Immigration Laws hereinbefore more particularly described. [4]

Your petitioner further alleges, that the said detained, though a person of Chinese antecedents, is not an alien, but is a citizen of the United States, and that his status as a citizen of the United States has been determined by the immigration authorities for the Port of San Francisco, and was so determined when the said detained was incoming passenger No. 14776/4-26, ex. SS. "Mongolia," which arrived at the Port of San Francisco on the 26th day of October, 1915, and thereafter upon the 9th day of November, 1915, the said detained was permitted to enter the United States, as a citizen thereof by the Commissioner of Immigration for the Port and District of San Francisco, and that the said detained has continuously been and now is a resident of the United States, as a citizen thereof, and that he is deprived of his liberty herein, in violation of the provisions of Article 5, in amendment to the Constitution of the United States in this, that he is deprived of his liberty without due process of law, and that the action of the Secretary of Labor, in issuing said warrant of deportation, and the action of the said Commissioner of Immigration in holding the detained in custody thereunder, is in violation of the power and authority conferred upon each of said officers, and their said action in the premises is without statutory authority, and in excess of the

powers and authority conferred upon them by the statutes in such cases made and provided, and the said warrant of deportation is for said reason null and void, and the detention of the detained thereunder without due process of law, and that the detained as such citizen of the United States of America cannot be deprived of his liberty save by due process of law after a fair hearing before the judicial branch of the Government of the United States, which said hearing before the judicial branch of the Government [5] of the United States has been denied him.

That your petitioner further alleges upon his information and belief that the alleged hearing upon which the said warrant of deportation was issued by the Secretary of Labor was unfair in this, that there was no evidence in said record to sustain the conclusion and finding of the Secretary of Labor that the detained is an alien and his conclusion that the detained, when he entered the United States, as a citizen thereof, did so fraudulently, is unsupported by the evidence and said conclusion or finding of the said Secretary rests upon conjecture and suspicion, and not upon evidence, and that there was no substantial or other evidence to sustain the said order of deportation made by the said Secretary, and that for said reason the said order of deportation is arbitrary and unfair, and subject to judicial review.

That your petitioner Mok Jack, is the father of the above detained; that your petitioner is a nativeborn citizen of the United States of America, and has continuously been domiciled therein since your

affiant last re-entered the United States, when he was incoming passenger on the "America Maru," which arrived at the port of San Francisco, about during the months of October or November, 1903, and that your petitioner was thereupon permitted to enter the United States, as a native-born citizen thereof, and your affiant ever since has been a continuous resident thereof. That your affiant has not in his possession a copy of the immigration record or hearing used as a basis or foundation for the issuance of his said warrant of deportation herein against the said detained. That the said hearing took place in the State of Alabama and there is no copy of said record within the jurisdiction of this Court, and that it is impossible for your petitioner to obtain a copy thereof to file with this petition. That upon the information and belief of your petitioner the only copy of said [6] hearing is in the office of the Secretary of Labor, in Washington, D. C., and in the office of the immigration authorities in the State of Alabama, or where said hearing was conducted, and that the said detained has just been brought within the jurisdiction of this Court for the purpose of being deported as hereinbefore set forth, and that sufficient time has not elapsed between the bringing of the said detained within the jurisdiction of this Court and the contemplated deportation to enable your petitioner to procure a copy of said immigration record, and to delay the filing of the petition herein until a copy thereof could be obtained would render it impossible to present the petition to this Court in time to prevent the deportation herein sought to be prevented.

WHEREFORE YOUR PETITIONER PRAYS, that a writ of habeas corpus issue herein, as prayed for, directed to the said Commissioner commanding him to have the body of the said detained, together with the time and cause of his detention before your Honor at a time and place to be therein, in said order specified, to the end that the cause of the detention of the said detained may be inquired into, and that he may be discharged from custody.

MOK JACK, Petitioner. [7]

### UNITED STATES OF AMERICA.

State and Northern District of California, City and County of San Francisco,—ss.

Mok Jack, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

### MOK JACK.

Subscribed and sworn to before me this 9th day of October, 1916.

[Seal]

R. H. JONES,

Notary Public in and for the City and County of San Francisco, State of California.

(CHINESE PICTURE.)
Photograph of Petitioner.

[Endorsed]: Filed Oct. 9, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [8]

In the District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,104.

In the Matter of the Application of MOK NUEY TAU, on Habeas Corpus.

### Order to Show Cause.

Good cause appearing therefor and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the Port and District of San Francisco, appear before this Court on the 14 day of October, 1916, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein as prayed for; and that a copy of this order be served upon the said Commissioner, and a copy of said petition upon the United States Attorney.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders of said Commissioner or of the Secretary of Labor, shall have the custody of the said Mok Nuey Tau are hereby ordered and directed to retain the said person within the custody of the said Commissioner of Immigration and within the jurisdiction of this Court until its further order herein.

Dated San Francisco, California, October 9, 1916.
M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct. 9, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [9]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 11th day of November, in the year of our Lord, one thousand nine hundred and sixteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 16,104.

In the Matter of MOK NUEY TAU, on Habeas Corpus.

### (Minutes of Hearing on Order to Show Cause.)

This matter came on regularly this day for hearing of the order to show cause as to the issuance of a writ of habeas corpus herein. Geo. A. McGowan, Esq., was present as attorney for petitioner and detained. C. A. Ornbaun, Esq., Assistant United States Attorney, was present on behalf of respondent and filed demurrer to the petition herein and then presented the Immigration Records as to detained herein, which the Court ordered filed and marked Respondent's Exhibits "A" and "B" and that the same be considered as a part of the original petition filed herein. Said matter was then argued

by counsel for respective parties and ordered submitted. [10]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

### No. 16,104.

In the Matter of the Application of MOK NUEY TAU, on Habeas Corpus.

### Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges

### I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

### II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,
United States Attorney.
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Nov. 11, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [11]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,104.

In the Matter of MOK NUEY TAU, on Habeas Corpus.

(Order Sustaining Demurrer to and Denying Petition for a Writ of Habeas Corpus.)

GEORGE A. McGOWAN, Esq., Attorney for Petitioner.

JOHN W. PRESTON, Esq., United States Attorney, and CASPER A. ORNBAUN, Esq., Assistant United States Attorney, Attorneys for Respondent.

The demurrer to the petition for a writ of *habeas* corpus herein is sustained, and the said petition is denied.

November 14th, 1916.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Nov. 14, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [12]

In the District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

### No. 16,104.

In the Matter of the Application of MOK NUEY TAU, on Habeas Corpus.

### Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the Hon. JOHN W. PRESTON, United States Attorney for the Northern District of California:

You and each of you will please take notice that Mok Nuey Tau, the detained herein, by Mok Jock, the petitioner herein, do hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order made and entered herein on the 14th day of November, 1916, sustaining the demurrer and denying the petition for a writ of habeas corpus filed herein.

Dated San Francisco, California, November 24th, 1916.

### GEO. A. McGOWAN,

Attorney for Petitioner Detained and Appellants Herein. [13] In the District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

### No. 16,104.

In the Matter of the Application of MOK NUEY TAU, on Habeas Corpus.

### Petition for Appeal.

Comes now Mok Nuey Tau, the detained, by Mok Jock, the petitioner, who are appellants herein, and say:

That on the 14th day of November, 1916, the above-entitled court made and entered its order denying the petition for a writ of *habeas corpus* as prayed for and filed herein, in which said order certain errors are made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herein:

WHEREFORE these appellants pray that an appeal may be granted in their behalf to the Circuit Court of Appeals of the United States for the Ninth District for a correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit. It is further prayed that during the pendency of the said appeal, the said Mok Nuey Tau may be granted his liberty and remain at large upon a bond in the sum of \$1,000, conditioned that he remains within the

United States and renders himself in execution of whatever judgment is finally entered herein.

Dated San Francisco, California, November 24th, 1916.

### GEO. A. McGOWAN,

Attorney for Petitioners, Detained and Appellants Herein. [14]

In the District Court of the United States, in and for the Northern District of California, Southern Division, Division No. 1.

### No. 16,104.

In the Matter of MOK NUEY TAU, on Habeas Corpus.

### Assignment of Errors.

Comes now, Mok Nuey Tau, the detained herein, by Mok Jock, the petitioner herein, both of whom are appellants herein, by their attorney, George A. McGowan, Esquire, in connection with their petition, for a hearing herein, assign the following errors which they aver occurred upon the trial or hearing of the above-entitled cause, and upon which they will rely, upon appeal to the Circuit Court of Appeals, for the Ninth Circuit, to wit:

First. That the Court erred in denying the petition for a writ of *habeas corpus* herein.

Second. That the Court erred in not holding that it had no jurisdiction to issue a writ of *habeas* corpus, as prayed for in the petition herein.

Third. That the Court erred in not holding that the allegations contained in the petition herein, for a writ of *habeas corpus*, were sufficient in law, to justify the granting and issuing of a writ of *habeas corpus*, as prayed for in said petition.

Fourth. That the Court erred in holding that the immigration authorities had accorded the appellant Mok Nuey Tau a fair hearing in the executive deportation proceeding.

Fifth. That the Court erred in not holding that the Secretary of Labor could not issue a warrant of arrest without reasonable cause and not supported by oath or affirmation. [15]

Sixth. That the Court erred in holding that a person of Chinese descent could be tried for being illegally within the United States, in violation of the Chinese Exclusion Laws, under the method and gauge as provided in sections 21 and 22 of the General Immigration Law.

Seventh. That the Court erred in holding that the Secretary of Labor had jurisdiction in an executive deportation proceeding against the appellant, Mok Nuey Tau, a person of Chinese descent, charged with a violation of the Chinese Exclusion and Restriction Acts and not having been charged with a violation of the General Immigration Law.

Eighth. That the Court erred in holding that the Secretary of Labor had jurisdiction in an executive deportation proceedings against the appellant, Mok Nuey Tau, a citizen of the United States.

Ninth. That the Court erred in holding that the Secretary of Labor could deport a citizen of the United States by charging that he was an alien when there was no evidence before the Secretary to prove the alienage.

WHEREFORE, the appellants pray that the judgment and order of the United States District Court, in and for the Northern District of the State of California, made and entered herein in the office of the clerk of said court on the 14th day of November, 1916, discharging the order to show cause and dismissing the petition for a writ of habeas corpus be reversed and that this cause be remitted to the said lower court with instructions to discharge the said Mok Nuey Tau from custody, or grant him a new trial before the lower court, by directing the issuance of a writ of habeas corpus, as prayed for in said petition.

Dated San Francisco, California, November 24th, 1916.

### GEO. A. McGOWAN,

Attorney for Appellants. [16]

Due service and receipt of a copy of the within notice of appeal, petition for appeal and asst. of errors is hereby admitted this 29 day of Nov., 1916.

### JOHN W. PRESTON,

CGH.

U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Nov. 29, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [17]

In the District Court of the United States, in and for the Northern District of California, Southern Division, Division No. 1.

No. 16,104.

In the Matter of MOK NUEY TAU on Habeas Corpus.

# Order Allowing Petition for Appeal (and Releasing on Bond).

On this 29th day of November, 1916, come Mok Nuey Tau, the detained herein, by Mok Jock, the petitioner herein, both of whom are appellants herein, by their attorney, George A. McGowan, Esquire, and having previously filed herein, did present to this Court their petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosected by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and orders execution and remand stayed pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit, that the appellant, Mok Nuey Tau, may be released upon bond in the sum of One Thousand Dollars (\$1,000) and

that he remain within the United States, and render himself in execution of whatever judgment is finally entered herein at the termination of said appeal, and that the United States Marshal for this District is authorized to take the detained into [18] his custody for the purpose of effecting his release upon said bond.

Dated San Francisco, California, November 29th, 1916.

M. T. DO'OLING, U. S. District Judge.

[Endorsed]: Filed Nov. 29, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

### (Citation on Appeal—Copy.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, and to JOHN W. PRESTON, Esq., U. S. Attorney for the Northern District of California, his Attorney herein, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, Division No. 1, wherein Mok Nuey Tau and Mok Jock are appellants, and you are appellee, to show cause, if

any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, Southern Division, Div. #1, this 1st day of December, A. D. 1916.

> M. T. DOOLING, United States District Judge.

Service of the within Citation on Appeal and receipt of a copy thereof is hereby admitted this 1st day of December, 1916.

JNO. W. PRESTON, U. S. Attorney.

[Endorsed]: Filed Dec. 1, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [20]

### (Appearance Bond.)

MASSACHUSETTS BONDING AND INSURANCE COMPANY.

Home Office, Boston, Massachusetts.
(CHINESE PICTURE)

United States of America, Northern District of California, Southern Division, Division No. 1.—ss.

BE IT REMEMBERED, That, on the —— day of December, 1916, before me, Thos. E. Hayden, United States Commissioner, of the United States District Court for the Northern District of Califor-

nia, at San Francisco, personally appeared Mok Nuey as Principal, and Massachusetts Bonding and Insurance Company, a corporation, organized and existing under the laws of the Commonwealth of Massachusetts, as surety, and jointly and severally acknowledged themselves to be indebted to the United States of America, in the sum of One Thousand (1,000) Dollars, lawful money of the United States, to be levied and made out of their respective goods, chattels, lands and tenements, to the use of the said United States.

THE CONDITION of the above recognizance is such that WHEREAS there was presented on behalf of the said principal, Mok Nuey, a petition for a writ of habeas corpus and on the 29th day of November, 1916, the Court made its order that said Mok Nuey be released from his detention during the further pendency of said petition for a writ of habeas corpus and until the further order of the Court in the premises, upon giving a bond in the sum of One Thousand (1,000) Dollars;

NOW, THEREFORE, if said Mok Nuey shall personally appear at the District Court of the United States for the Northern District of California, Southern Division, First Division No. 1, at any time that he may be required to answer and render himself amenable to any and all further orders and processes in the premises and not depart from the said Court, without leave first obtained, and, if ordered remanded into the custody whence taken, [21] will surrender himself in execution thereof,

then this obligation to be null and void; otherwise to remain in full force and virtue.

MOK NUEY.

MASSACHUSETTS BONDING AND INSURANCE CO.

[Surety Seal]

By FRANK M. HALL,

Attorney in Fact.

Taken and acknowledged before me on the day and year first above written.

[Commissioner Seal]

### THOMAS E. HAYDEN,

United States Commissioner, Northern District of California, South. Division, at San Francisco.

Form of bond and sufficiency of the surety is hereby approved.

CASPER A. ORNBAUN, Asst. U. S. Atty.

[Endorsed]: Filed Dec. 9, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,104.

In the Matter of the Application of MOK NUEY TAU, on Habeas Corpus.

Stipulation and Order Respecting Withdrawal of Immigration Record.

IT IS HEREBY STIPULATED and agreed by and between the attorney for the petitioner and

appellant herein, and the attorney for the respondent and appellee herein, that the original immigration record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this court.

Dated San Francisco, California, January 15th, 1917.

GEO. A. McGOWAN, Attorney for Petitioner and Appellant. JNO. W. PRESTON,

United States Attorney for the Northern District of California,

Attorney for Respondent and Appellee. [23]

### Order.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to, may be withdrawn from the office of the clerk of this court and filed in the office of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this court.

Dated San Francisco, California, January 15, 1917.

### M. T. DOOLING,

United States District Judge.

Due service and receipt of a copy of the within stipulation and order is hereby admitted this 15th day of January, 1917.

JNO. W. PRESTON,

U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [24]

District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

### No. 16,104.

In the Matter of the Application of MOK NUEY.
TAU, on Habeas Corpus.

### Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the appellant herein, it is hereby ordered that the time within which the record in the above-entitled cause may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended for a period of twenty days from and after the date hereof.

Dated San Francisco, California, December 27th, 1916.

### WM. H. HUNT,

United States Judge.

Due service and receipt of a copy of the within order is hereby admitted this 27th day of Dec., 1916.

### JNO. W. PRESTON,

U. S. Attorney, Northern District of California, Attorney for Respondent.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [25]

District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

### No. 16,104.

In the Matter of the Application of MOK NUEY TAU, on Habeas Corpus.

### Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of George A. McGowan, attorney for the appellant herein, it is hereby ordered that the time within which the record in the above-entitled case may be docketed in the office of the clerk of the United States Circuit of Appeals for the Ninth Circuit is hereby extended for a period of twenty (20) days from and after the date hereof.

Dated San Francisco, California, January 12th, 1917.

M. T. DOOLING, United States District Judge. [Endorsed]: Filed Jan. 12, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [26]

District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,104.

In the Matter of the Application of MOK NUEY TAU, on Habeas Corpus.

### (Order Extending Time to Docket Case.)

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the appellant herein, it is hereby ordered that the time within which the record in the above-entitled cause may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, is hereby extended for a period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, January 31st, 1917.

M. T. DOOLING,

United States District Judge.

The foregoing extension of time is hereby stipulated and agreed to by and between the counsel for the respective parties hereby.

JNO. W. PRESTON,

United States Attorney for the Northern District of California,

Attorney for Petitioner and Appellant. GEO. A. McGOWAN, Attorney for Petitioner and Appellant.

[Endorsed]: Filed Jan. 31, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 27 pages, numbered from 1 to 27, inclusive, to contain a full, true and correct transcript of certain records and proceedings, in the Matter of Mok Nuey Tau, on Habeas Corpus, No. 16,104, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the praecipe on file herein, (copy of which is embodied in this transcript), and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Twelve Dollars and Twenty Cents (\$12.20), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal, issued herein, page 29.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of February, A. D. 1917.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath, Deputy Clerk. [28]

### (Citation on Appeal—Original.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, and to JOHN W. PRESTON, Esq., U. S. Attorney for the Northern District of California, His Attorney Herein, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, Division No. 1, wherein Mok Nuey Tau and Mok Jock are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, Southern Division, Div. #1, this 1st day of December, A. D. 1916.

M. T. DOOLING,

United States District Judge. [29]

[Endorsed]: No. 16,104. United States District Court for the Northern District of California, Southern Division, Division #1. In re Mok Nuey Tau, etc., Appellants, vs. Edward White, Commissioner of Immigration. Citation on Appeal. Filed Dec. 1, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

Service of the within Citation on Appeal and receipt of a copy thereof is hereby admitted this 1st day of December, 1916.

JNO. W. PRESTON, U. S. Attorney.

[Endorsed]: No. 2944. United States Circuit Court of Appeals for the Ninth Circuit. Mok Nuey Tau, by Mok Jock, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed March 1, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk.

# Certificate of Clerk U. S. District Court to Original Exhibits.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the accompanying exhibits, namely, Respondent's Exhibits "A" and "B," are original exhibits introduced and filed in the Matter of Mok Nuey Tau, on Habeas Corpus, No. 16,104, and are herewith transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit, as per order of this Court, a copy of which is embodied in the transcript on appeal herewith.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 13th day of February, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath, Deputy Clerk.

CMT.

[Endorsed]: No. 16,104. U. S. District Court, Northern District of California, First Division. In the Matter of Mok Nuey Tau, on Habeas Corpus. Certificate of Clerk, U. S. District Court, to Original Exhibits.

No. 2944. United States Circuit Court of Appeals, for the Ninth Circuit. Certificate of Clerk U. S. District Court to Original Exhibits. Filed Mar. 1, 1917. F. D. Monckton, Clerk.

IN THE

# Uirruit Court of Appeals

For the Ninth Circuit

In re:

MOK NUEY TAU, on Habeas Corpus,

Appellant,

VS.

EDWARD WHITE, as Commissioner, etc.

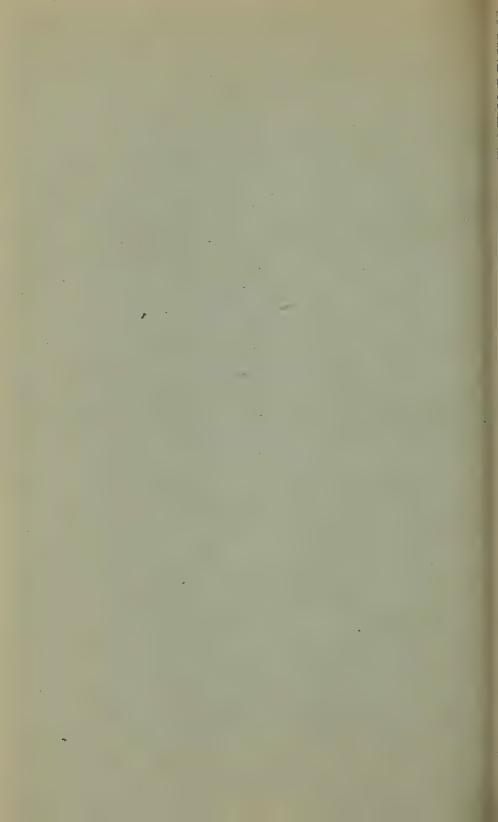
Appellee.

### Brief for Appellant

GEO. A. McGOWAN, Attorney for Appellant. Bank of Italy Building, San Francisco, California

	MAY 24 15 W
Filed this	day of May, 1917.
	Frank D. Monckton, Clerk. Monckton
	Chi

By.....Deputy Clerk.



IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

In re:

MOK NUEY TAU, on Habeas Corpus,

Appellant,

VS.

EDWARD WHITE, as Commissioner, etc.

Appellee.

## Brief for Appellant

### STATEMENT OF THE CASE.

Mok Nuey Tau is a foreign born son of Mok Jack, who is a native born citizen of the United States, whose status as such native-born citizen is conceded in these proceedings. Mok Jack sent to China for his son Mok Nuey Tau, to come to the United States, and in compliance therewith, he arrived at the port of San Francisco on the ss. "Mongolia" on October

26, 1915, and after due examination into his status as such citizen, he, the said Mok Nuey Tau, was ordered admitted into the United States, as a citizen thereof, by the Commissioner of Immigration at the port of San Francisco on November 9th, 1915, and ever since said date the said Mok Nuey Tau has lived within the United States, mixed with and become a part of the population thereof. He was 8 years of age when admitted into the United States. His father, Mok Jack, was then, and now is a resident of Oakland, California (Tr. 5 and 7.)

Mok Nuey Tau, while at large, as part and parcel of the citizenship of the United States, was arrested in the State of Alabama, on an executive warrant of arrest issued by the Secretary of Labor, and after a hearing, in which his minority was ignored, he was ordered deported by the Secretary of Labor upon the grounds hereinafter set forth.

At this hearing, Mok Nuey Tau, a little boy then but 9 years of age, a minor, and hence unable to enter a contract or appear civilly upon his own behalf, was made the defendant in a deportation proceeding and without affording him a proper opportunity to defend himself or have his father notified, so he could do so for him, his case was closed, and despite the affirmative evidence of his citizenship, and the fact that there was no evidence of alienage, he was none the less adjudged an alien who had entered the United States in violation of law.

"The warrant of arrest was issued under Section 21 of the Immigration Act, approved Feby.

20, 1907, being subject to deportation under the provisions of a law of the United States, to wit: the Chinese Exclusion laws, for the following among other reasons:

"That he has been found within the United States in violation of Section 6, Chinese exclusion act of May 5, 1892, as amended by the Act of November 3rd, 1893, being a Chinese laborer not in possession of a certificate of residence; and that he has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes, and

"Whereas from evidence submitted to me, it appears that the said alien has been found in the United States, in violation of the Act of February 20th, 1907, amended by the Act approved March 26, 1910, for the following among other reasons:

"That he arrived in the United States under sixteen years of age, unaccompanied by one or both of his parents; and that he was a person likely to become a public charge at the time of his entry into the United States."

The appellant was ordered deported under the General Immigration law, though in truth and in fact, the said detained was entitled to a hearing before a justice, judge or commissioner of the Judicial Department of the United States, to determine the

legality or non-legality of his residence in the United States.

The petition for the writ of habeas corpus is applied for by Mok Jack, the father, on his behalf and that of his son (Tr. 3 to 8.)

The Immigration record was presented in court and deemed a part of the petition. (Tr. 10.) The respondent interposed a demurrer. (Tr. 11) which the lower court sustained (Tr. 12.) This appeal is taken therefrom.

### POINTS URGED.

- 1. That there was no evidence of alienage before the Secretary of Labor, and there was *prima facie* evidence of citizenship and said warrant of deportation being without evidence to support it is void.
- 2. That the appellant is a person of Chinese descent, and if illegally here under the facts charged, is entitled to have that fact determined by the Judicial branch of the Government, and the Secretary of Labor is without jurisdiction in the premises.
- 3. That the Executive hearing was unfair, no adequate provision being made to safeguard the interests of the defendant, he being under the disability of minority.

#### FIRST.

Upon the first point we submit that the father is a native-born citizen of the United States and is conceded in these proceedings to be such. The son, it is further conceded made regular application to enter the United States as a citizen thereof, and after due investigation, was ordered admitted into the United States, as a citizen thereof. His entry was regular. The immigration authorities, under their regulations, first admitted Mok Nuey Tau under the Immigration Law, and then the Chinese Exclusion or Restriction Acts.

### Ex parte Wong Tuey Hing 213 Fed. 112.

"I am of the opinion that if petitioner is unlawfully in this country it is not because of his being an alien, but because he is a Chinese alien; that is to say, if he is unlawfully here, it is not because of the provisions of the immigration law, but because of the provisions of the Chinese exclusion laws. If he entered without inspection, as the warrant of deportation recites, it was because the immigration officers did not desire to inspect him, not because he prevented them from doing so.

Rule 3 of the regulations governing the admission of Chinese, provides as follows:

'Chinese aliens shall be examined as to their right to admission to the United States under the provisions of the law regulating immigration as well as under the laws relating to the exclusion of Chinese. As the immigration act relates to aliens in general, the status of Chinese applying for admission must first be determined in accordance with the terms of that law and of the regulations drawn in pursuance thereof; then, if found admissible under such law and regulations, their status under the Chinese exclusion laws and regulations shall be determined.'

"It is evident therefore that, if the immigration officers failed to inquire into petitioner's status as an alien as distinguished from his status as a Chinese alien, they did so in violation of this rule, and cannot now hold petitioner responsible therefor."

The record of the landing of Mok Nuey Tau, the sworn evidence therein contained, show by a preponderance of evidence his American citizenship. There was no proper evidence of alienage at all, and the finding of the Secretary of Labor that Mok Nuey Tau was an alien, is without evidence to support it.

Whitfield vs. Hanges 222 Fed. 745.

Ong Chew Lung vs. Burnett 232 Fed. 853.

Chan Kam vs. U. S. 232 Fed. 855.

The warrant is issued out of hostility to the statute under which foreign born sons of citizens of the United States, derive their citizenship. The following cases embody decisions of the Department of Labor, practically contemporaneous in point of time, which show this attitude, as indeed Rule 9 mentioned in Ex. "A" herein and in the following cases also, discloses:

Ex parte Lee Dung Moo 230 Fed. 746.

Ex parte Leong Wah Jam 230 Fed. 540.

Ex parte Ng Doo Wong 230 Fed. 751.

Ex parte Tom Toy Tin 230 Fed. 747.

The Government did not appeal from these decisions construing the Rule 9 therein mentioned, which is the same Rule 9 mentioned in Ex. "A," but had the matter referred to the Attorney General of the United States. His opinion was adverse to the views of the officials of the Labor Department and upheld the Court opinions. That portion of Rule 9 was thereafter revoked.

The conclusion of alienage springs from suspicion and not from the evidence. The defendant had the burden of proof to meet when he arrived at this country, and he satisfactorily met it, and established his citizenship. Now the burden of proof has shifted, and it is on the government to show alienage. This they have not done. The conclusion of alienage is the offspring of an unfounded suspicion. The Certificate of Identity, and the evidence given on his application to land, is worth something as evidence; it makes out a *prima facie* case.

Lin Hop Fong vs. U. S. 209 U. S. 453.

Wong Yee Toon vs. Stump 233 Fed. 194.

Ex parte Lam Pui 217 Fed. 456.

Ex parte Lam Fuk Tak 217 Fed. 468.

U. S. vs. Quan Wah, 214 Fed. 462.

### SECOND:

Upon this point it is urged that the appellant did not enter the United States in violation of the Immigration Law, and it is only by a forced, unnatural and we feel unwarranted construction of the facts, that this point is rendered seemingly, but not in fact, tenable.

The Chinese regulations provide for a prior examination of all applicants for admission, under the General Immigration Law, and that the case shall not be examined under the Chinese Acts until it has been passed under the General Immigration Act. This point has been before the lower court, and its views thereon are registered in the case of *ex parte* Wong Tuey Hing 213 Fed. 112.

We may pass from this feature to the real point, and that is whether a person of Chinese descent charged with entering the United States and being therein in violation of the Chinese Exclusion Acts, may be deported in the manner provided for in the General Immigration Law? If the infraction is a surreptitious entry, that is, an entry without inspection, this may be done U. S. vs. Wong You 223 U. S. 67; If the infraction is moral dereliction, this may be done, Low Wah Suey vs. Backus, 225 U. S. 460; Looe Shee vs. North 170 Fed. 566; If the bar is a dangerous, contagious and loathsome disease, it may be done. In re Lee Sher Wing, 164 Fed. 506.

The point here is not substantially a violation of the General Immigration Law, but a claimed viola-

tion of the Chinese Exclusion Act. The Chinese Exclusion Act provides its own method of deportation, which embraces a Judicial hearing before a justice, judge or commissioner. Section 43 of General Immigration Act provides that it "shall not be construed to repeat, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent," Section 21 of the General Immigration Act providing for the machinery for deportations under that act includes therein all persons liable to deportation under that act, "or of any other law of the United States." Now the contention of the government is that the use of the phrase "or of any other law of the United States," gives them the right to arrest, try and deport in the manner provided for in the General Immigration Act, Chinese persons for a violation of solely the Chinese Exclusion Acts. We contend that this would be altering or amending the Chinese Exclusion Acts to the extent of substituting an executive hearing for a judicial hearing, and is prohibited by said section 43. The cases relied upon by the appellant are:

Ex parte Wong Tuey Hing 213 Fed. 112.

Ex parte Woo Jan, 228 Fed. 927.

U. S. vs. Prentis 230 Fed. 935.

Affirmed C. C. of A. 7th Ct., Oct. term 1916, January session. (Not published yet.)

See Wong Hin vs. Mayo 240 Fed. 368, C. C. of A., 5th Ct.

We interpret the clause "or any other law," as used in this section, to mean merely that when a judicial order of deportation is ready for execution, then the actual deportation may be executed as provided in the General Immigration Law, not that the procedure of arrest and trial shall be had as therein provided. The Chinaman has a substantial right in a judicial hearing, which with its greater rights and privileges, better enables him to defend himself against the charge so brought against him. When his judicial hearing is over, and the judgment is a finality, he is only then, in the sense used in the act "liable to deportation" and he cannot be heard to complain whether he be deported by the U.S. Marshall or turned over by that officer to the Immigration officers, for them to place him on the steamer.

The only advantage to the Government which we feel was intended was that the expense or procedure, as the case may be, of providing tickets, etc. would all be in the hands of the Immigration Department, and kept in one uniform account, and their statistical records and research thereof, would be simplified by all being placed through the medium of one set of deportation officers. This interpretation is well within the line of reason and is in harmonious accord with the true operation of both acts, and does not permit the one to encroach upon the other. This construction is in harmonious accord with the statute itself. Section 20 of the General Immigration Law provides for the hearing and Section 21 of the method of actual deportation after the termination of the hearing. and it is only in the latter section that the phrase "or of any other law of the United States" is used.

### THIRD:

Under this head we direct attention to the fact of the minority of this defendant, with its accompanying disability. This boy came to his father in Oakland, after they had, by their testimony and that of an identifying witness, the prior landed brother, satisfied the immigration authorities of the bona fides of the claim of citizenship. This father, reared and living for many years in San Francisco with its large population of Chinese, has witnessed the evils of the Chinese community, the ever recurring Tong or highbinder outlawery, the pitfalls which beset the paths of the Chinese youths growing up in the midst of unusual liberty and but little restraint, and this coupled with the hostile or unfriendly feeling of the western white population, convinced him that he would make a better future for his son, if he permitted him to go to a more hospitable community, where there existed no embers of Asiatic hostility; where no evil associates would be crowded about him, and where, being permitted to mingle with white people freely, he would acquire a more useful knowledge and education and insure a more useful and contented life, and so the father permitted his little son to go to the south.

An examination of the record for the purpose of showing the points of unfairness in the executive hearing, brings to light a number of glaring particulars, in which the rights of this appellant have not been properly or at all safeguarded.

- (a) The first point which we desire to urge is that the warrant of arrest in this case is issued in violation of Article 4 in Amendment to the Constitution of the United States in that the warrant of arrest was issued and was not based "upon probable cause, supported by oath or affirmation." The legal presentation of this point is now under submission of this court in case No. 2859, Chin Ah Yoke alias Jane Doe, Appellant, vs. Edward White, as commissioner, etc., taken under submission at the February term of this court, and reference is made to pages 21 to 27 inclusive of the brief for appellant, filed in said matter, for the presentation of the legal view raised upon behalf of the appellant herein on said point.
- (b) The hearing herein was unfair in that no opportunity was given the appelant to be represented by counsel when it would have been of any service to him. Appellant, a boy of nine years of age, according to American calculation, or ten years according to Chinese calculation, was, despite his youth and immaturity, subjected to a gruelling examination, which is to be found from pages 19 to 31 in Exhibit "A", filed with the clerk herein. This examination is 13 pages in length. The Inspector, after asking all the questions he could think of, finally propounded this last question to the appellant: "Q. Under the law you have a right to be represented by an attorney at this year. Do you wish to avail yourself of that right and employ a lawyer? A. I don't understand that. I will see Loo Yut."

This question and answer perforce, is the arraignment of this nine year old child, in which it is pre-

sumed that he would know what the nature of the proceedings were, and what to do to protect and safeguard his rights. The Loo Yut referred to, was immediately examined, and his examination covers pages 15 to 19 inclusive of Exhibit "A" filed with the clerk herein. All that was done to speak to Loo Yut about the matter appears in the last question of his examination which is as follows: "Q. Under the law this boy has a right to be represented by an attorney at this hearing, if he so desires. He says that he will see you about it. Do you wish to employ a lawyer for him? A. No I will not employ a lawyer now. I will wait and see what they do in Washington." This hearing was conducted on July 17, 1916.

This little child was, upon that date, subjected to this examination, and his witness was also examined, without any adequate opportunity being afforded to safeguard the rights of this applicant. Not only does this condition exist, but the most detrimental thing in connection with it is that there was no notification that they could see the evidence against the boy to enable them to determine whether it was necessary to submit any defense, thus violating their own regulations which are mandatory that this be done.

The Immigration regulations promulgated which govern such executive deportation proceedings are found in Rule 22 sub. 4 as follows:

<sup>&</sup>quot;Executive of warrant of arrest and hearing thereon:

<sup>(</sup>a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons

therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported.

- (b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued: and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief."
- (c) Evidence detrimental to the appellant, was submitted to the Department under cover of the report of the examining inspector. This report is on pages 34 and 35 of Exhibit "A," filed with the clerk. The part of the report to which exception is taken is as follows:

"And little is to be added other than to state that since the hearing on the above date, information was obtained by Inspector Worden while in Montgomery, on the 25th ultimo, to the effect that this boy is the son of Loo Gee of Birmingham, Ala., and is not the son of Mok Juck, Oakland, California, and that the Chinaman Loo Yut or Lo Mong Nam, with whom the boy is living at Alexander City, Ala., and who deposited the thousand dollars cash with the bondsmen in the case, is Loo Gee's brother, and therefore the uncle of the alien. This information was received in a confidential manner from one Chung Kee Lung of Montgomery, Alabama, but no statement could be secured from him for obvious reasons."

This bit of evidence is the only thing contained in the entire Immigration record which negatives the claim of citizenship of this appellant, and yet the attention of the appellant or his witness was not called to it, but on the contrary, it appears to have been willfully and purposely suppressed and withheld from them. That it was considered by the Department, and went to support and made up the adverse finding of the Secretary, and contributed towards the issuance of the warrant of deportation, is evidenced by the fact that the evidence is reported almost verbatum in the decision of the Assistant Secretary, wherein the warrant of deportation is directed to be issued. Tt is fundamental in cases of this kind, that a person proceeded against, must be apprised of all of the evidence against him, so that he may have full opportunity of making answer thereto. (Rule 22 sub. 4 supra.)

In the present case there appears to have been a successful suppression of the only affirmative evidence submitted to the department, showing, or tending to show that this appellant was not a citizen.

(d) A further element of unfairness of this hearing appears from the fact that no attempt at all was made to secure the testimony of this appellant's father. The record discloses that a letter was sent from Alabama, which finally reached the Commissioner of Immigration at San Francisco, and an effort was made to locate the father of this appellant, and when they did locate the father of this appellant, they did not even notify him or tell him of the trouble in which his son was involved. They did not ask him any questions at all, which would have shown the citizenship of this appellant. The examination seemed to have been conducted and was limited solely to ascertaining the fact that the father was in Oakland, California. These letters, and the examination in question may be found on pages 1, 2, and 3, of Exhibit "A," filed with the clerk herein. The propriety of giving the father of this boy a chance to be heard upon behalf of his boy, and notifying him of the conditions existing, was called to the attention of the Department, as is shown on page 34 of Exhibit "A," when the Inspector in charge, Thos. V. Kirk, suggested to the Commissioner General of Immigration, that the record be sent to San Francisco, to examine the father, but this suggestion was not complied with. A study of the record in this deportation case will show that it was conducted solely by the government officers for the presentation of their own case, and

without adopting even those usual methods followed in obtaining the evidence from a witness then under examination, for the defendant. What would a little boy, nine years of age, know about safeguarding his interests, or whether he needed an attorney or not, or what should be done, when confronted with a deportation proceeding. Certainly, the proper thing to have done, would have been to have considered him, so to speak, as the ward of the court, as all minors are considered, in probate courts, and their rights should be protected as such. In this case, the record of the landing of this appellant in the United States, shows the positive nature of the testimony presented upon his behalf. We refer to page 13, of Exhibit "B" filed with the clerk, which contains the report of the examining inspector, when this appellant was an applicant for admission into the United States. report is dated November 8th, 1915, and is found in the Admission Record Exhibit "B" filed with the clerk and at page 13 thereof.

"The applicant in this case is only 8 years of age actual or American reckoning. There are several discrepancies in the testimony relating to the locations of the applicant's house, whether he accompanied his brother to the front of the village or Chek Hom market when the brother left for the U. S., the exact location of the ancestral hall, and the names and locations of some of the neighbors. These disagreements, however, are, in my opinion, not sufficient under the circumstances, to warrant denial, as they are such

as might be due to the extreme youth of the applicant.

"There is a good resemblance between the father, the applicant and the brother, who appeared as a witness. Another favorable feature is the fact that although the father was old enough to have claimed several boys born prior to his return to the U. S. in 1903, he claims only one such child.

"In my opinion, there is not sufficient adverse evidence to justify the denial of the applicant. A favorable recommendation is therefore submitted."

Pages 11 and 12 of this Exhibit "B" contain the said Inspector's abstract of record and report, and from this appears in part that the father's American nativity is established; his presence in China on the trip essential to permit of paternity is verified; there is a prior landed brother and this applicant is mentioned in the testimony in that case; that there is a good resemblance between the father and applicant; between the prior landed brother and the applicant, and betwen the father and the prior landed brother; that the prior landed brother was a supporting witness; that the demeanor of all witnesses during examination was satisfactory; that none of them were substantially discredited before the Immigration office to the knowledge of the Inspector, and that the Inspector believed the relationship existed. When the father returned here in 1903 he testified that he was married and then had one son (page 2 of father's examination in his own prior landing record in Exhibit "B".)

There was no action taken by the Immigration authorities to notify the father that his son had been arrested. The father was examined to ascertain the fact that he himself was physically present in Oakland, California on March 14th, 1916, as is shown on page 3 of Exhibit "A," which is the report of the Immigration Inspector, stating that he called at the laundry, and found the father there. The warrant of arrest was issued months thereafter, and the actual arrest of this little appellant and the hearing on the warrant apparently both took place on July 17, 1916. The Immigration record upon which the applicant had been admitted into the United States, was apparently considered as part and parcel of the hearing, as is shown by page 33 of Exhibit "A."

In finally submitting this matter, we feel compelled to say that there has been no full or fair hearing accorded this appellant by the Immigration authorities upon the warrant of arrest, and that the action of said officers in transmitting evidence to the Department clandestinely, as far as the appellant was concerned, is in and of itself an act of unfairness of such a glaring kind and character, that it cannot be overlooked. The evidence transmitted, constituted and was the only evidence before the Department which tended to show that this appellant was an alien, or not the person who he claimed to be, and to have concealed from him the knowledge of this evidence, and giving him no opportunity to make answer thereto, was certainly most unfair and prejudicial, and cre-

ates the impression that the Inspector considered that he had the right to transmit evidence against the appellant without notifying him of it. This clearly in violation of the rules and regulations. Special attention is directed in this case to the Immigration record Exhibit "A", wherein it is set forth that this case is almost exactly the same as the case of Wong Yee Toon, who had been arrested under a similar warrant of arrest, and had been ordered deported by a United States District judge in the case of ex parte Wong Yee Toon, 227 Fed. 247 decided by District Judge Rose, and because that applicant was deported and that warrant of deportation was upheld that this appellant should be ordered deported. It is a matter of some little satisfaction to counsel to be able to point out that the judgment of the lower court in ex parte Wong Yee Toon has been reversed on appeal, by the Circuit Court of Appeals for the Fourth District, the title being Wong Yee Toon vs. Stump. A. .. Fed. 194, to which decision the attention of this Honorable Court is most respectfully invited. We think the particular elements of unfairness of the hearing set forth herein warrant the issuance of the writ of habeas corpus as prayed for in the petition in this matter, upon the ground that the hearing accorded was unfair upon the authority of the following decisions:

Low Wah Suey vs. Backus 225 U. S. 460.

Chin Yow vs. U. S. 208 U. S. 8.

Whitfield vs. Hanges 222 Fed. 745.

Ong Chew Lung vs. Burnett 232 Fed. 853.

Chan Kam vs. U. S. 232 Fed. 855.

Ex parte Lam Pui 217 Fed. 456.

Ex parte Lam Fuk Tak 217 Fed. 468.

McDonald vs. Sin Tak Sam 225 Fed. 710.

U. S. vs. Williams 200 Fed. 538.

U. S. vs. Williams 189 Fed. 915.

U. S. vs. Williams (affirmed) 206 Fed. 460.

U. S. vs. Williams 175 Fed. 274.

Respectfully submitted,

GEO. A. McGOWAN,
Attorney for Appellants.

IN THE

## United States Circuit Court of Appeals

For the Ninth Circuit

In re:

MOK NUEY TAU, on Habeas Corpus,

Appellant,

VS.

EDWARD WHITE, as Commissioner, etc.,
Appellee.

# Appellant's Petition for a Rehearing



F. D. Monckton,

GEO. A. McGOWAN, Attorney for Appellant, Bank of Italy Building, San Francisco, California.

$\mathbf{F}$ iled	this	day	of	Se	ptembe	er, I	1917.
		Fran	nk ]	D.	Monckt	ton,	Clerk

By.....Deputy Clerk.



#### IN THE

## United States Circuit Court of Appeals

For the Ninth Circuit

In re:

MOK NUEY TAU, on Habeas Corpus,

Appellant,

VS.

EDWARD WHITE, as Commissioner, etc.,
Appellee.

# Appellants' Petition for a Rehearing

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

This appellant humbly presents this his petition for a rehearing based upon the fact that since the hearing herein the statute under which this proceeding was had, has been changed by Congress in such a way as to indicate, we respectfully submit, that the statutory construction we had formerly urged in this matter was well taken as correctly interpreting the former intention of Congress. This assertion seems well founded in the light of certain changes in the new General Immigration Law hereinafter set forth.

The first point urged by the appellant was that being a Chinese person if illegally here, he is entitled to have that fact determined by the judicial branch of the government. If the ILLEGALITY in question arises from the Chinese Exclusion or Expulsion Laws, such a hearing is mandatory according to the terms of the said laws; but the General Immigration Act in Section 21, providing the machinery of deportation by Executive Warrant and hearing, for those liable to deportation thereunder also contains the phrase "OF ANY OTHER LAW OF THE UNITED STATES"; while section 43 of the last mentioned act provides that it "SHALL NOT BE CONSTRUED TO REPEAL. ALTER, OR AMEND EXISTING LAWS RE-LATING TO THE IMMIGRATION OR EXCLU-SION OF CHINESE PERSONS OR PERSONS OF CHINESE DESCENT." Obviously if the appellant is here in violation of the General Immigration Law, he may be deported by the machinery therein provided, notwithstanding the fact that the particular infraction of the General Immigration Law was also a violation of the earlier Chinese Exclusion or Expulsion Laws. The reason is that any alien other than Chinese might also be deported for the same infraction of the General Immigration Law. ANY ALIEN may surreptitiously enter the United States without inspection, and ANY SUCH ALIEN, including Chinese, may be summarily arrested by executive warrant and so deported. This was the holding of the Supreme Court in U. S. vs. Wong You, 223 U. S. 67. ANY ALIEN may become morally objectionable and hence ANY SUCH ALIEN, including Chinese, may also be summarily arrested by executive warrant and so deported. This was the holding of the Supreme Court in Low Wah Suev vs. Backus, 225 U.S. 460. ANY ALIEN may be physically unfit or deficient, and hence ANY SUCH ALIEN, including Chinese, may also be summarily held without our borders, or if here, arrested by executive warrant and so deported. In re Lee Sher Wing, 164 Fed. 506, 24 Op. Attv. Gen. p. 706. In each of these instances the subject of the proceedings might be a Chinese alien, or a non-Chinese alien. Eliminate the Chinese Exclusion or Expulsion Act entirely. and the indicated Chinese person who entered surreptitiously, who was morally objectionable or physically unfit, might still be so proceeded against. That, we submit, is the true test as to whether any particular interpretation of the General Immigration Law would in effect be an amendment, a repeal or an alteration of the existing Chinese Exclusion or Expulsion Act. If the Chinese Exclusion or Expulsion Acts are necessary to support a cause of action, then it is an alteration or amendment thereof, and to that extent a repeal of its provisions, to proceed in a manner contrary to that authorized by the Chinese Exclusion or Expulsion Acts.

In the case at bar, if the Chinese Exclusion or Expulsion Acts were eliminated, there would be no cause of action under the General Immigration Law. The government claims a violation solely of the Chinese Exclusion or Expulsion Laws, and claims that the subject thereof is deportable therefore in the manner provided for in the General Immigration Law because of the said phrase "OR OF ANY OTHER LAW OF THE UNITED The appellant claims that to do this STATES." is to violate the said section 43, which says that the General Immigration Law "SHALL NOT BE REPEAL, ALTER CONSTRUED TO OR AMEND EXISTING LAWS RELATING TO THE IMMIGRATION OR EXCLUSION OF CHINESE PERSONS OR PERSONS OF CHI-NESE DESCENT."

In its opinion herein the court decides the point adversely to the appellant on the authority of U. S. vs. Wong You, 223 U. S. 67, and Backus vs. Ow Sam Goon, 235 Fed. 847. As to the first case we have shown that Wong You was deportable for a direct violation of the General Immigration Law, not for what was solely a violation of the Chinese Exclusion or Expulsion Laws. In the Ow Sam

Goon case the charge was that the Chinese person had surreptitiously re-entered the United States, that is,—entered without inspection, thus violating section 34 of the General Immigration Act and Sec. 13 of the Act of Sept. 13, 1888, of the Chinese Exclusion and Expulsion Acts. Here we have the same point which was before the Supreme Court in the Wong You case. In its opinion this court held (235 Fed. 849-850):

"MORROW, Circuit Judge (after stating the facts as above) (1, 2):

- 1. It is clear that whatever authority is possessed by the Secretary of Labor to deport aliens found in this country is derived from the Immigration Act of February 20, 1907, c/1134 (34 Stat. 898908), and not from the Chinese Exclusion Act of September 13, 1888, c.1015 (25 Stat. 476), which vests such authority only in United States courts and justices, judges and commissioners thereof.
- 2. It is contended by appellant that, from the opinion above mentioned, it is apparent that the lower court considered only the legality of the assistant secretary's finding in the warrant of deportation that the alien was in the United States in violation of section 7 of the Chinese Exclusion Act, and either overlooked or ignored the finding that the alien was in the United States in violation of section 36 of the Immigration Act.

There is nothing in the opinion suggesting that the court either overlooked or ignored the finding that the alien was in the United States in violation of section 36 of the Immigration Act; on the contrary, the decision is based upon the question of jurisdiction of the assistant secretary under that act."

Apply the test before suggested by eliminating the Chinese Exclusion and Expulsion Acts, and Ow Sam Goon would have been deportable under the General Immigration Law for his surreptitious entry or entry without inspection, had the facts established such a re-entry, which in his case they happily did not. Hence these two cases do not go to the extent of the point presented by this case. The intention of Congress must prevail in construing this statute, its terms are to some extent conflicting.

Happily we are now not without light as to the intention of Congress in the use of that phrase of the General Immigration Laws. The act under consideration was in force Feb. 20, 1907, to July 1st, 1916. Section 19 has been amended in the new act in a manner entirely unnecessary if the opinion of this court correctly expressed the former will of Congress. Note the final clause to the Sec. 19 of the new act:

"PROVIDED FURTHER: That any person who shall be arrested under the provisions

of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final."

Section 43 of the old act is embraced in Sec. 38 of the new act. Note the alteration:

"PROVIDED, that this act shall not be construed to repeal, alter, or amend existing laws, relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in section nineteen thereof."

We cannot impute to Congress the enactment of useless legislation, but on the contrary, feel that the act as amended is to be construed as a new departure now, for the first time, authorizing and legalizing an Executive deportation proceeding, under the General Immigration Laws for solely a violation of the Chinese Exclusion or Expulsion Acts. This was the interpretation placed on the act by the Circuit Court of Appeals for the 5th and 7th Circuits, as pointed out in our brief herein.

Upon appellant's behalf it is felt that a judicial hearing or even another executive hearing, now that he will have had prior and adequate notice thereof, will afford appellant an opportunity to present evidence upon his behalf and be represented by counsel at such hearing, and then fully and adequately protect his right of residence in the United States by presenting evidence upon his own behalf and having the benefit of counsel.

Respectfully submitted,

GEO. A. McGOWN, Attorney for Appellant.

### CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is in judgment of counsel well founded, and is not interposed for delay.

> GEO. A. McGOWAN, Attorney for Appellant.





